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Antitrust Standing and the Rule Against Resale Price Maintenance

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The United States Supreme Court's decision in 1977[1] that a private antitrust plaintiff bringing an action for damages must prove antitrust injury has energized the antitrust bar, and the federal courts, to invent notions of antitrust standing. In later cases, the Court has attempted to shape a policy of antitrust standing which properly integrates a concept of antitrust injury and guides access to the federal courts.[2] Instead, the Court has created a vague balancing test for determining standing to sue in private antitrust actions and an indeterminate standard for deciding whether a plaintiff has alleged antitrust injury. The Court's doctrinal standards for determining which parties gain access to the federal courts to assert antitrust claims has created great uncertainty in the lower federal courts and the antitrust bar. This uncertainty has been caused by the Court's failure to define the relationship of the antitrust injury requirement to the broader doctrine of antitrust standing in private antitrust actions, the vague descriptions of those doctrines, and the use of those threshold inquiries to decide cases on the merits.

Inventive and controversial efforts to shape an antitrust standing doctrine have been made by lower courts in cases involving private actions for maximum resale price maintenance. These cases typically involve claims by terminated distributors that a manufacturer or supplier conspired with another distributor to fix maximum resale prices and that the termination was a consequence of the plaintiff's refusal to adhere to the fixed resale prices.[3] Antitrust defendants have successfully argued that a terminated distributor or other competitor, while having suffered damages as a result of termination or lost sales, has not suffered "antitrust injury."[4]

The circuit courts of appeal are split on the issue of antitrust injury in maximum resale price maintenance cases.[5] The courts denying standing to terminated distributors and competitors have reasoned that they have suffered no antitrust injury because consumers of the price fixed products are being made better off by the price fixing scheme.[6] This view of antitrust standing has been advanced by academic commentary that the

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[1] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[2] Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986); Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983); Blue Shield v. McCready, 457 U.S. 465 (1982).

[3] *See, e.g.*, Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

[4] *See, e.g.*, Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir.), *reh'g denied* (1989).

[5] *Compare* USA Petroleum Co. v. Atlantic Richfield Co., 859 F.2d 687 (9th Cir. 1988), *cert. granted*, ____ U.S. ____, 109 S. Ct. 2446 (1989) *with* Tennessean Truckstop, Inc. v. NTS, Inc, 875 F.2d 86 (6th Cir. 1989); *Indiana Grocery*, 864 F.2d 1409 (1989); *Jack Walters & Sons*, 737 F.2d 698.

[6] *See, e.g.*, *Indiana Grocery*, 864 F.2d at 1419-20.

advancement of economic efficiency is the only purpose for the antitrust laws.[7] A contrasting view identifies broader objectives to the antitrust laws and concludes that, since vertical price fixing conspiracies are presumptively illegal, antitrust standing should be granted to competitors harmed by the practice.[8]

The cases involving claims for maximum resale price maintenance illustrate dramatically the deficiencies of the antitrust standing and antitrust injury doctrines articulated by the Supreme Court. The Court's treatment of those fundamental threshold doctrines is not anchored to either congressional intent favoring private rights of action or any discernable policy for private antitrust actions. The Court's failure to apply, in a principled and predictable manner, a policy-based doctrine of antitrust standing raises fundamental issues of proper institutional powers.

This Article examines the textual and prudential foundations of the antitrust standing and antitrust injury doctrines. This examination is conducted through a textual analysis of section 4 of the Clayton Act, which provides a private right of action for persons injured by violations of the antitrust laws, and a developmental review of the principal Supreme Court cases articulating and applying those doctrines. This examination concludes that the Court has crafted antitrust standing and injury doctrines which in part either contradict the textual requirements of section 4 or which are not rooted in any perceptible notion of legitimate statutory objectives. The Article also demonstrates a core of statutory principles and judicial interpretation which can form a principled and threshold analysis of antitrust standing.

The Article proposes an approach of antitrust standing which recognizes the proper accommodation between congressional power to create private rights of action and legitimate judicial power limiting access to the courts for reasons which permit the accomplishment of congressional objectives and protect judicial resources. This approach to antitrust standing, which draws upon established analysis of statutory standing in administrative law proceedings, is then applied to private claims for damages from maximum resale price maintenance.

I. A DOCTRINAL REVIEW OF ANTITRUST INJURY AND ANTITRUST STANDING REQUIREMENTS

This section conducts a review of the development of the standing doctrine and antitrust injury requirement in antitrust cases. This review

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[7] *See, e.g.*, Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1450-51 (1985) [hereinafter Page, *Antitrust Liability*]; Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980) [hereinafter Page, *Antitrust Damages*].

[8] *See, e.g.*, *USA Petroleum*, 859 F.2d 687.

considers the textual requirements of section 4 and the Supreme Court's efforts to craft an antitrust standing policy. The review concludes that neither the standing doctrine nor the antitrust injury requirement have been clearly formulated because the Court has failed to precisely link them with the statutory scheme of the antitrust laws. Instead, the Court has created a vague and seemingly shifting set of standards for determining antitrust standing and has used the antitrust injury doctrine to address substantive antitrust issues on the merits.

A. Standing to Sue in Antitrust Cases

In recent years the Supreme Court has decided several cases concerning the right of a private party to maintain an antitrust action.[9] These lawsuits were brought pursuant to section 4 of the Clayton Act, which provides a private right of action for damages to "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws . . . ."[10] In those cases the Court has established the elements of a private cause of action under section 4, and, in particular, has articulated a doctrine of antitrust standing.

Under the antitrust standing doctrine a threshold examination of the relationship between the defendant's conduct and the plaintiff's injury is used to determine who gains access to the federal courts. In this fundamental respect antitrust standing is like standing to sue in other contexts.[11] The process of fashioning a standing analysis is seldom easy, and the ingredients of a standing analysis are generally not precisely drawn.[12] It is, however, possible to define the basic contours of the jurisprudential and functional purposes served by a standing to sue doctrine, whether or not it specifically addresses antitrust claims.

First, a standing to sue analysis performs a threshold examination of the parties, their claims, and the substantive underpinnings of the plain-

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[9] *See, e.g.*, Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986); Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983); Blue Shield v. McCready, 457 U.S. 465 (1982); Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[10] Section 4 of the Clayton Act, 15 U.S.C. § 15 (1988), provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee
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> . . . .

[11] *See* Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434, 1466 (1988); Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68, 88-92 (1984).

[12] In the context of article III standing, Chief Justice Rehnquist explained that "[w]e need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency . . . ." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982).

tiff's claims.[13] Second, the standing to sue doctrine has two essential ingredients: the textual requirements of positive law (for example, a statutory or constitutional provision) which permit an injury to be redressed in the federal courts, and non-textual or prudential considerations which are shaped by courts to advance legitimate institutional concerns.[14] In significant part, the standing to sue doctrine articulates an institutional accommodation between the judicial and the legislative branches in which the latter creates rights of action and the former facilitates the proper dispatch of those rights.[15]

The next two parts of this Article explicate the textual requirements of section 4 and set forth the Court's treatment of both textual requirements and prudential considerations. The textual requirements derive from the language of the statute; the non-textual or prudential considerations, however, are judicially created rules which manifest either judicial interpretation of statutory requirements or fundamental judicial concerns about administering legislative intent.[16]

A concluding summary demonstrates the confused nature of the current antitrust standing doctrine and how the antitrust injury doctrine has lost its procedural significance and become an ambiguous rule of substantive law.

1. A Textual Analysis of Antitrust Standing

There are several statutory or textual requirements in private actions brought under section 4 of the Clayton Act. First, a "person" entitled to maintain an action for an antitrust violation must be a member of a rather broad classification of individual and commercial entities, such as partnerships, corporations, and persons, that are entitled to maintain a

[13] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-14, at 107-111 (2d ed. 1988). In the context of antitrust standing, *see* Page, *Antitrust Liability*, *supra* note 7, at 1447 (describing the requirements of section 4 of the Clayton Act as "tools by which courts identify which victims of an antitrust violation may recover damages, given the nature of the relationship between the victim's harm and the violation.").

[14] Nichol, *supra* note 11, at 71-72; Sunstein, *supra* note 11, at 1470.

[15] *See* Sunstein, *supra* note 11, at 1459-60; Nichol, *supra* note 11, at 88-101.

In constitutionally based actions, the nature of the separation of powers issues is more complex than in actions involving claims under congressional enactments. *See* Nichol, *supra* note 11, at 90-93. However, the institutional capability issues are fundamentally the same; i.e., the courts must determine if Congress intended to grant access to the federal courts to that type or class of plaintiff. *Id.* at 91.

[16] Prudential concerns about antitrust standing are similar to prudential considerations in other forms of standing. They are extra-textual pronouncements by courts which may serve to advance judicial economy and properly limit the exercise of judicial decision-making in inappropriate cases. These considerations can also be applied in improper ways, for example, by providing a rationale for a court's pretextual decision on the merits. Nichol, *supra* note 11, at 71-73.

private action.[17] Second, a private party seeking damages must be injured in his "business or property." The Court has given a broad reading to this requirement of a recognizable economic injury, holding that a consumer of price fixed goods has suffered injury to her "property."[18]

Third, the plaintiff must show that he was injured "by reason of" an antitrust violation. The Court has construed the "by reason of" language as requiring that the antitrust plaintiff show that the defendant's conduct "caused" or was a material or substantial factor in his injury.[19] This causation requirement has been held to reflect a congressional concern that there be a sufficient factual nexus between the alleged injury and the defendant's anticompetitive conduct.[20] It also reflects the requirement, applied from the law of torts, that a plaintiff may recover only for injuries which are proximately related to the violation, being neither too remote nor merely incidental.[21] Finally, section 4 also requires that an antitrust private plaintiff prove that she suffered antitrust injury; that is, the plaintiff must demonstrate that she was injured because of "anything forbidden in the antitrust laws."[22]

These textual requirements of private causes of action are at the core of the antitrust standing doctrine and the broadly drafted language reflects a congressional design to accomplish substantive objectives.[23] The

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[17] *See, e.g.*, Pfizer Inc. v. Government of India, 434 U.S. 308 (1978).

[18] Reiter v. Sonotone Corp., 442 U.S. 330, 343-44 (1979).

The Court found that the language of section 4, particularly the word "property," should be given "a naturally broad and inclusive meaning." *Id.* at 338. The Court in *Reiter* cited to its decision in Pfizer Inc. v. Government of India, 434 U.S. 308 (1978), for the proposition that section 4 contains very little restrictive language. *Reiter*, 442 U.S. at 337. In the *Pfizer* case, the Court stated that:

> The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden by whomever they may be perpetrated. . . . And the legislative history of the Sherman Act demonstrates that Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning.

Pfizer, 434 U.S. at 312.

[19] Blue Shield v. McCready, 457 U.S. 465 (1982).

[20] *See* Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983); Blue Shield v. McCready, 457 U.S. 465 (1982).

[21] H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 14.3, at 361-64 (1985).

[22] The origin of the antitrust injury requirement in private lawsuits appears to follow from the statutory language in section 4 that a plaintiff must prove that she was injured by "anything forbidden in the antitrust laws . . . ." 15 U.S.C. § 15. Although the Supreme Court examined the congressional purpose of private actions under section 4, it has failed to identify the precise origin of the antitrust injury rule created in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). *See infra* notes 39-41 and accompanying text.

[23] As used in this article, "antitrust standing" refers to the process of applying the elements or requirements of section 4 to a concrete factual situation to determine whether the plaintiff is entitled to invoke the jurisdiction of the federal courts. This process requires judicial consideration of each element of the plaintiff's cause of action for damages. This approach must be distinguished from another which views antitrust standing as representing only the causation element under section 4 claims for damages. *See* Page, *Antitrust Liability*, *supra* note 7, at 1446-47.

textual content of the antitrust standing doctrine is rooted in congressional desires to compensate injured victims and deter future antitrust violations.[24] The legislative histories of section 4 and its predecessor provision, section 7 of the Sherman Act, demonstrate that Congress intended to provide a remedial provision which encouraged private actions to recoup losses and prevent future anticompetitive behavior.[25]

It is also clear, however, that standing in antitrust cases is substantially more complex than suggested by the text of section 4. The Supreme Court has added to the textual requirements, through interpretation of textual requirements and the creation of extra-textual considerations, factors which affect the ability of parties to maintain private actions for alleged antitrust violations. The next section describes the process in which the standing doctrine and antitrust injury requirement have been created from the text of section 4. The section also details the Court's creation of non-textual considerations in private antitrust damage actions.

2. Judicial Development of the Antitrust Injury Requirement and the Antitrust Standing Doctrine

The United States Supreme Court in several important cases has articulated a number of factors which must be analyzed to determine if the plaintiff has adequately set forth a claim for damages under section 4. Those cases show that the Court has failed to articulate a coherent doctrine of antitrust standing for private antitrust actions. The Court has failed to focus on the central themes evident in the text of section 4 and has engrafted considerations into the law of standing. Some of these non-textual considerations are contradictory to the congressional purposes for creating private rights of action for the recovery of damages. Other judicially created considerations further the objectives of section 4 and address judicial concerns about the use of private attorneys general vindicating substantive antitrust law.

There are two principal components of the antitrust standing doctrine: the causation or nexus requirement and the antitrust injury requirement. Textually, these requirements arise from the congressional requirement that the plaintiff show he has been injured "by reason of anything forbidden in the antitrust laws." Although the Court has decided issues of interpretation of other textual requirements of section 4,[26] the Court has

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[24] *See infra* notes 132-34 and accompanying text.

[25] *See infra* notes 130-31 and accompanying text.

[26] *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (construing the term "property" to include overcharges paid by consumers); Pfizer Inc. v. Government of India, 434 U.S. 308 (1978) (concluding that the term "person" included foreign governments injured by domestic price fixing schemes); Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) (finding that a state could not assert a claim for damages in its *parens patriae* capacity).

emphasized the development of the standing requirement in a series of cases involving the causation and antitrust injury requirements.[27]

a. Development of the Antitrust Injury Doctrine

The Court fashioned the antitrust injury doctrine in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[28]. A bowling center operator brought a private antitrust action claiming that the defendant, a large manufacturer of bowling equipment and operator of bowling alleys, violated section 7 of the Clayton Act. According to the plaintiff's claim, the defendant had acquired and operated several bowling alleys which competed with plaintiff and the plaintiff suffered injury because the defendant's large size permitted it to operate alleys which would otherwise have failed. The plaintiff claimed that it was injured by the reduction in profits experienced because the defendant acquired and operated the alleys; that is, plaintiff measured its damages by "the additional income they would have realized had the acquired centers been closed."[29]

The Court first held that the process of "intermeshing" a substantive statutory prohibition with a remedial provision is not always easy.[30] The Court rejected the argument that the plaintiff need prove only that it was worse off after the acquisition than it would have been without the acquisition.[31] Instead, the Court stressed the substantive policy of section 7, which prohibits mergers "only when they may produce anticompetitive effects."[32] The Court went on to debunk plaintiff's theory of recovery by holding that the plaintiff would have suffered the same kind of injury if a small firm had acquired the failing alleys. Moreover, the Court criticized the plaintiff's attempt to measure damages by the amount of profits they would have realized if competition had been reduced. The Court held that:

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."[33]

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[27] Prior to 1977, the Supreme Court did not decide any cases involving either the causation, or "by reason of", language or the antitrust injury requirement. Since 1977, however, the Court has issued at least five cases which directly or indirectly involve the causation or antitrust injury requirements. *See supra* note 9.

[28] 429 U.S. 477 (1977).

[29] *Id.* at 481.

[30] *Id.* at 486.

[31] *Id.*

[32] *Id.* at 487.

[33] 429 U.S. 477.

The *Brunswick* Court did not require that an antitrust plaintiff must prove an actual lessening of competition as a condition of maintaining a section 4 claim.[34] Rather, plaintiffs may prove injury by pointing to losses incurred as a result of anticompetitive conduct which itself violates substantive antitrust law.[35]

A narrow reading of the Court's decision in *Brunswick* suggests that the decision was obviously correct; a person should not be allowed to recover damages measured in a way (i.e. by the amount of lost monopoly profits) that stands the policy of antitrust law on its head. The *Brunswick* decision, however, has other interpretations which have complex and disturbing implications for the antitrust standing doctrine.[36] Those interpretations suggest that the antitrust injury requirement is a rule of substance, permitting courts to dismiss otherwise meritorious cases under the guise of a threshold standing issue.[37] Some interpretations also conclude that courts can dismiss presumptively illegal antitrust claims because of the judge's ideological beliefs about the proper purposes of the antitrust laws.[38]

There are several difficulties in both the language of the *Brunswick* decision and the interpretations of the antitrust rule created in that case. In the first place, the Court never identified the source — textual, interpretative or prudential — for the antitrust injury rule set out in the decision. Although it is probably safe to conclude that the source of the rule is the language providing a private action for anyone injured by "anything forbidden in the antitrust laws," the Court did not link its rule that the plaintiff must establish "antitrust injury" to any statutory text. Nor did the Court point to any source in the legislative history of section 4 which would define the meaning of the "antitrust injury" requirement.[39] Instead, the Court held that the plaintiff's claimed injury in that case "was not of the 'type of injury that the statute was intended to forestall'," citing to a case in which a private right of action by the government was

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[34] *Id.* at 489 n.14.

[35] *Id.*

[36] Those interpretations are identified in Calvani, *The Mushrooming Brunswick Defense: Injury to Competition, Not to Plaintiff*, 50 ANTITRUST L.J. 319, 324-26 (1982).

[37] This is a prevalent misconception about the *Brunswick* rule. In Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc., 784 F.2d 1325, 1333-34 (7th Cir. 1986), the court said that *Brunswick* warns against granting relief to competitors injured by an antitrust violation where their interests are different than consumers'. One commentator interpreted *Brunswick* to hold that "reductions in profits attributable to conduct by the defendant that preserves allocative efficiency or that increases its productive efficiency cannot be recovered as damages." Page, *Antitrust Damages*, *supra* note 7, at 484-85. *See also* P. AREEDA & H. HOVENKAMP, ANTITRUST LAW, par. 335.1c, at 231 (1986 Supplement).

[38] *See, e.g.*, Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir. 1984).

[39] The Court examined the congressional purposes of private actions under section 4 to support its conclusion that the statute was "designed primarily as a remedy." *Brunswick*, 429 U.S. at 486 n.10.

implied from a penal statute.[40]

The Court's lack of clarity about the source of the antitrust injury requirement is disturbing for two reasons. First, it is apparent that the process of discerning legislative policy in applying the textual requirement is not similar to the process of determining whether to imply a private cause of action.[41] The first process examines the language of the statute and its legislative history to determine the existence of a legislative intent to recognize a particular claim, while the latter process invokes federalism concerns and attempts to discern the implication of legislative interest in access to the federal courts.[42] Second, the Court's failure to identify the source of the antitrust injury rule impedes the process of categorizing the attributes of the rule as required by the text of section 4 or created by the Court to reflect prudential concerns. The process of distinguishing textually required law from judicially created considerations is important because the power of Congress to create private rights of action lies at the core of standing analysis. Furthermore, to the extent that the antitrust injury requirement reflects purely judicial concerns, it is subject to modification or disregard by Congress or the courts.[43]

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[40] *Id.* at 487-88 (quoting Wyandotte Co. v. United States, 389 U.S. 191, 202 (1967)). The *Wyandotte* case involved an action brought by the United States to recover costs incurred in removing a negligently sunk vessel. In holding that the government had an implied civil right of action under the Rivers and Harbors Act of 1899, the Court held that:

> [O]ur reading of the Act does not lead us to the conclusion that Congress must have intended the statutory remedies and procedures to be exclusive of all others. There is no indication anywhere else — in the legislative history of the Act, in the predecessor statutes, or in nonstatutory law — that Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility.

389 U.S. at 200.

[41] *See, e.g.*, Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 396 (1987); Nichol, *supra* note 11, at 91.

[42] In Cort v. Ash, 422 U.S. 66, 78 (1975), the Court formulated a four part standard for recognizing implied private rights of action:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Although the Court has applied the *Cort* standard with varying degrees of enthusiasm, it has not overruled the *Cort* standard. *Compare* Cannon v. University of Chicago, 441 U.S. 677 (1979) *with* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), and Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

More fundamentally, the process of implying a private right of action under a statute otherwise silent on the issue is fundamentally different than determining the scope of a private right of action expressly created by statute.

[43] Sunstein, *supra* note 11, at 1466.

The *Brunswick* decision also fails to identify the precise relationship between the antitrust injury requirement and antitrust standing doctrine. The language of section 4 constrains litigable private antitrust actions to those in which a plaintiff has been injured in his business or property by conduct which violates the antitrust laws. The *Brunswick* holding treats antitrust injury as a distinct element to the plaintiff's cause of action and not as a logical and causal connection between the plaintiff's damage and the defendant's conduct.[44] However, in later cases, the Court developed a multi-factor standing analysis which merely included a demonstrated antitrust injury as a factor in determining whether the plaintiff had standing.[45] The lack of clarity concerning the nature of the antitrust injury rule presents a fundamental issue of the Court's power to supplement congressional requirements in a manner which makes the maintenance of private antitrust actions more difficult and impedes the accomplishment of congressional purposes.[46] The more narrow reading of *Brunswick*, which views the antitrust injury requirement as a part of the causal requirement, is more faithful both to the congressional purposes for section 4 and to notions of judicial deference to congressional prerogative.

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[44] 429 U.S. at 488. There is language in *Brunswick* which suggests that the Court considered the antitrust injury requirement to be an aspect of the causation requirement. In addressing the possibility that the plaintiff's method of measuring damages might result in windfall profits, the Court held that:

> it is quite clear that if respondents were injured, it was not "by reason of anything forbidden in the antitrust laws": while respondents' loss occurred "by reason of" the unlawful acquisition, it did not occur "by reason of" that which made the acquisitions unlawful.

Id. at 488.

[45] For example, in Associated Gen. Contractors v. California State Council of Carpenters, the Court stated:

> We conclude, therefore, that the Union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law. Other relevant factors — the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy — weigh heavily against judicial enforcement of the Union's antitrust claim. Accordingly, we hold that . . . the Union is not a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act.

459 U.S. at 545-46.

[46] In Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979), the Court stated: "[w]e must take the statute [§ 4] as we find it. Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations." (emphasis in original)

Another issue implicated by the *Brunswick* opinion concerns the Court's creation of several non-textual considerations which condition an antitrust plaintiff's access to the federal courts. Some of these considerations appear to exceed the textual requirements of section 4, while others appear to comport with congressional intent in creating a private right of action. The Court, however, did not explain which considerations are required by the text of section 4 and which are merely prudential. This failure to identify the prudential, and judicial, nature of the rule has led some courts and commentators to conclude that the antitrust injury rule possesses independent substantive value and may be used to weed out some antitrust claims on the merits.[47] Antitrust standing, like other forms of statutory standing, examines the relationships amongst the plaintiff, his injury, the defendant's conduct, and the policies and values underlying the substantive statute which proscribes the defendant's conduct. Any standing doctrine represents a judicial standard which must seek to advance congressional or constitutional policy while ensuring proper institutional involvement by the courts.[48] Standing doctrine, therefore, must stress the statutory requirements creating the right of action and should not be used to advance nonjurisdictional ends.[49]

There are several extra-textual considerations in *Brunswick*. First, the language in *Brunswick* that a plaintiff must allege and prove an "injury of the type the antitrust laws were intended to prevent" adds to the statutory standing requirement by suggesting that only certain types of injuries, or injuries to certain types of interests, are actionable. The statutory text, however, provides a private right of action to anyone injured because of "*anything* forbidden in the antitrust laws." The distinction between the textual requirement and the Court's language may be significant. Courts have conducted an inquiry into whether the plaintiff's injury is of an appropriate type, notwithstanding a Supreme Court conclusion that the conduct which harmed the plaintiff was illegal.[50]

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[47] *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582-83 (1986); Page, *Antitrust Damages, supra* note 7, at 471-72, 492; P. AREEDA & H. HOVENKAMP, *supra* note 37, at 231.

[48] In Valley Forge Christian College v. Americans United for Separation of Church and State, Inc. 454 U.S. 464, 471 (1982), the Supreme Court stated that standing doctrine "subsumes a blend of constitutional requirements and prudential considerations." The constitutional requirements, which derive from article III, require a party seeking to invoke the powers of federal courts to demonstrate: " 'that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' . . . that the injury 'fairly can be traced to the challenged action' . . . [and that the injury] 'is likely to be redressed by a favorable decision'." *See also* L. TRIBE, *supra* note 13, at 107-08.

[49] Nichol, *supra* note 11, at 73; L. TRIBE, *supra* note 13, at 110; *see also* Flast v. Cohen, 392 U.S. 83, 99 (1968) (standing doctrine should look only "on the party seeking to get his complaint before a federal court and not on the issue he wishes to have adjudicated.")

[50] *See, e.g.*, Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1417-20 (7th Cir. 1989).

Second, the *Brunswick* Court also held that there exists an important connection between the plaintiff's assertion of antitrust injury and the manner in which he measures his damages. The Court objected to the plaintiff's measurement of damages, concluding that the lost profits claimed as damages bore "no relationship" to the substantive underpinnings of section 7's prohibitions.[51] Indeed, the *Brunswick* holding can reasonably be interpreted as involving only a judicial condemnation of damage measurement theories which violently conflict with antitrust policy.[52] To the extent that *Brunswick* conditions access to the federal courts on allegations of a proper method of measuring damages, it represents a judicial consideration which prevents courts from awarding damages based upon speculative or inappropriate theories.

Third, the *Brunswick* Court also held that the plaintiff's injury "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."[53] This holding minimally requires a close nexus between the plaintiff's injury and that which makes the defendant's conduct violative of the antitrust laws. This requirement underscores that nature of the *Brunswick* antitrust injury rule which requires a causal link between the plaintiff's harm and the defendant's conduct.[54] However, the language has been construed to require proof of an anticompetitive effect from the defendant's conduct as a condition to maintaining a private action under section 4.[55] Although proof of an effect on competition is an element of some substantive violations of antitrust law,[56] it has never been considered an ingredient to maintaining a private right of action.

These non-textual considerations articulated by the Court in *Brunswick* are capable of advancing or retarding the accomplishment of the congressional objectives of section 4. Considerations which limit congressional objective should be discarded and those which promote congressional policy should be retained. In all events the Court must identify the policy justifications for any prudential consideration which adds to the textual requirements.

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[51] 429 U.S. at 485.

[52] The *Brunswick* Court did not dismiss the plaintiff's case on the merits, but rather held that normally a new trial on the damages claims is appropriate. *Id.* at 489-90. The Court decided that a new trial on the damages issue was not warranted because the plaintiff was unable to demonstrate any other acceptable theories of damages. The Court stated that the plaintiffs "based their case solely on their novel damages theory which we have rejected." *Id.* at 490.

[53] *Id.* at 489.

[54] *See* Page, *Antitrust Damages*, *supra* note 7, at 490 ("Antitrust injury . . . defines the kinds of damages that will be compensable by identifying the aspects of antitrust violations to which the plaintiff's injuries must be causally related.")

[55] *See, e.g., Indiana Grocery*, 864 F.2d at 1419-20.

[56] *See* United States v. United States Gypsum Co., 438 U.S. 422 (1978).

Another issue implicated by *Brunswick* concerns the relationship between section 4's requirements and the substantive statute involved.[57] It has been argued that *Brunswick's* formulation of an antitrust injury requirement was intended to apply only to claims by a competitor under section 7 of the Clayton Act.[58] This makes sense not only because of the language of the Court's opinion, but also because claims that a merger may tend to lessen competition are distinguishable from other claims under the antitrust laws.[59] However, the Supreme Court, and the lower courts, have applied the *Brunswick* rule in other types of cases,[60] suggesting that the antitrust injury requirement structured in *Brunswick* is applicable to all claims for damages.

Recently, for example, the Court applied the *Brunswick* antitrust injury standard in a most astonishing manner. In *Matsushita Electric Industrial Co. v. Zenith Radio*,[61] the Court addressed the issue of the sufficiency of proof of antitrust injury at the summary judgment stage. The plaintiffs, manufacturers and sellers of televisions, sued several Japanese or Japanese-controlled corporations that manufacture and sell consumer electronic products. The plaintiffs alleged that the defendants conspired to fix maximum prices on products in Japan, fixed minimum prices in the United States, entered into formal agreements with the Japanese government which established minimum prices (called "check prices") and agreed to distribute their products in the United States according to a "five-company rule," by which each Japanese producer was permitted to sell to only five American distributors.[62] The Court held that summary judgment was appropriately entered by the district court because the plaintiffs failed to adduce sufficient evidence that the defendants engaged in a price fixing conspiracy. However, the Court, in dicta, observed that the plaintiffs could not recover damages for any conspiracy to charge higher than competitive prices because such conduct would benefit, and

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[57] In *Brunswick*, the Court correctly noted that "[i]ntermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms is not without difficulty." 429 U.S. at 486.

[58] H. HOVENKAMP, *supra* note 21, at 374.

[59] *Id.* at 374.

[60] *See, e.g.*, J. Truett Payne Co. v. Chrysler Motor Corp., 451 U.S. 557 (1981) (applied *Brunswick* analysis to a private action alleging illegal price discrimination under section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act); Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484 (8th Cir. 1985) (no antitrust injury suffered by actions to defeat issuance of revenue bonds); Chrysler Corp. v. Feders Corp., 643 F.2d 1229 (6th Cir. 1981), *cert. denied*, 454 U.S. 893 (1981) (no antitrust injury from refusal to make payments under purchase agreement); Almeda Mall, Inc. v. Houston Lighting & Power Co., 615 F.2d 343 (5th Cir. 1980), *cert. denied*, 449 U.S. 870 (1980) (no antitrust injury by refusal to sell power to mall).

[61] 475 U.S. 574 (1986).

[62] *Id.* at 580-81.

not harm, the plaintiffs.[63] The Court also held that the evidence of the alleged conspiracies to restrain trade could not serve as circumstantial evidence of a broader conspiracy to monopolize the American market by pricing below the market level because those conspiracies could not have caused the plaintiffs any injury.[64]

The antitrust injury requirement described in *Matsushita Electric Industrial* is fundamentally different than the rule set out in *Brunswick*, although the broad, undefined nature of the *Brunswick* rule permits its use for achieving nonjurisdictional ends. At its narrowest and most precise point, the antitrust injury rule connects the plaintiff's damages, appropriately measured, and that aspect of the defendant's conduct which contravenes substantive antitrust law. If there is a close causal relationship, congressional purposes are met. The rule was not intended to be used to dispose of claims on the merits or to permit judicial disregard of statements of positive law.

b. An Intermediate Analysis: The Merger of Antitrust Injury and Antitrust Standing

Following the *Brunswick* case, the Court decided two cases involving statutory standing in private antitrust actions. Unfortunately, the Court's

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[63] Although the issue on appeal to the Supreme Court was the sufficiency of proof of conspiracy, the Court took the opportunity to discuss "what [plaintiffs'] claim is *not*." *Id.* at 582 (emphasis in original). The Court first stated that the American antitrust laws have no extraterritorial effect and that the plaintiffs cannot recover damages for cartel activity in Japan. The Court continued:

> Nor can [plaintiffs] recover damages for any conspiracy by [defendants] to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act, but it could not injure [plaintiffs]; as [defendants'] competitors, [plaintiffs] stand to gain from any conspiracy to raise the market price in [consumer electronic products]. *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*, 429 U.S. 477, 488-489 (1977). Finally, for the same reason, [plaintiffs] cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supracompetitive pricing more attractive. Thus, neither [defendants'] alleged supracompetitive pricing in Japan, nor the five company rule that limited distribution in this country, nor the check prices insofar as they established minimum prices in this country, can by themselves give [plaintiffs] a cognizable claim against [defendants] for antitrust damages. The Court of Appeals therefore erred to the extent that it found evidence of these alleged conspiracies to be "direct evidence" of a conspiracy that injured [plaintiffs].

Id. at 582-83 (citations omitted, emphasis in original).

[64] *Id.* at 582-85 & n.7. The Court stated that irrespective of the claims of alleged conspiracies, the plaintiffs must demonstrate that they were harmed by the conspiratorial conduct and that the more narrow conspiracies (i.e., to raise prices in Japan, impose the "five-company rule", and the "check price" requirement) cannot have caused the plaintiffs any injury.

decisions in those cases added more uncertainty than clarity. In *Blue Shield v. McCready*,[65] the Court examined the effect of the statutory standing requirements on a health insurance subscriber who was used as a pawn in a competitive battle between health care providers. The plaintiff, a group health plan subscriber, received treatment from a psychologist and sued the insurer contending that the insurer and psychiatrists had conspired to restrain competition by excluding clinical psychologists from the reimbursement plans. The defendants argued that the plaintiff subscriber lacked standing to sue because the objective of the alleged boycott was an exclusion of clinical psychologists from a segment of the psychotherapy market and that the plaintiff's injury had only a remote and indirect relationship to the defendants' objective or purpose in imposing the restraint. The Supreme Court disagreed and held that the plaintiff, as an insurance plan subscriber, had standing to maintain the action under section 4 of the Clayton Act.

The Court held that section 4 permits recovery by a private party plaintiff only if he or she sustained injuries which are not too remote from the antitrust violation.[66] The Court stated that the questions of relationship between the plaintiff's injury and the defendant's actions can be resolved by looking at: first, the physical and economic nexus between the alleged violation and the harm to the plaintiff, and; second, to the relationship of the alleged injury with those forms of injury with which Congress was concerned in making the defendant's conduct illegal and in providing a private remedy under section 4.[67] The Court found that the plaintiff had suffered antitrust injury because her harm was a "necessary step" in effecting the purpose of the conspiracy and was "inextricably intertwined" with the injury defendants sought to inflict on the psychotherapy market.[68] Thus, the Court seemed to closely link the antitrust injury element with the requirement that the plaintiff establish a causal nexus between the defendant's anticompetitive conduct and the plaintiff's injury.

The Court's treatment of the causation element in section 4 appears to incorporate traditional tort principles of proximate cause into federal antitrust law.[69] However, the Court's conclusion that the plaintiff suffered antitrust injury because her welfare was interwoven with the interests of the real targets of the antitrust scheme suggests that the causation and antitrust injury elements are identical in nature. The Court's decision

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[65] 457 U.S. 465 (1982).
[66] *Id.* at 478-79.
[67] *Id.* at 478.
[68] *Id.* at 479, 484.
[69] Blue Shield v. McCready, 457 U.S. 465, 477 n.13 (1982). The Court surveyed the various standards or tests for determining the causal connection between the plaintiff's injury and the violation of substantive antitrust law, including the "target area," "direct injury," "factual matrix," and "zone of interests" tests. *Id.* at 476 & n.12.

also articulates a prudential consideration which permits antitrust standing where the plaintiff suffers injury indirectly as a result of the defendant's anticompetitive scheme to injure another party.[70]

In a subsequent case, *Associated General Contractors v. California State Council of Carpenters*[71], the Court reviewed the issue of antitrust standing, this time in the context of labor union activity, and seemingly retreated from its broadly stated rule in *Blue Shield v. McCready*. The case involved a suit by several unions (Unions) against a multi-employer association (Association) claiming that the Association and its members had coerced third parties and some Union members into dealing with non-union firms. The Unions asserted a claim that the Association had created a boycott aimed at harming the Unions' members.

In reversing the circuit court's grant of standing, the Supreme Court first considered the alleged restraints of trade in the relevant market for construction contracting and subcontracting. According to the Unions' complaint, the defendants coerced customers and potential customers, such as landowners and general contractors (i.e., the defendants themselves and their competitors) to give some of their business to non-union firms. Thus, some victims of the coercive behavior may have diverted contracts to non-union firms and thereby caused the loss of some business by unionized subcontractors.[72] The Court conceded that this coercive behavior may be an antitrust violation, but held that the existence of a violation does not necessarily mean that the union was injured by reason of an antitrust violation. Rather, the injury may have been inflicted on coerced customers or the defendants' competitors, and not on the plaintiff Unions or their members.[73]

The Court stated that the "by reason of" language in section 4 of the Clayton Act imposed a requirement that the courts must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them."[74] The Court examined the type and nature of the plaintiffs' alleged injuries and contrasted it with the conventional view that the antitrust laws were intended to protect consumers and competitors.[75] The Unions, according to the Court, were neither customers

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[70] *See* 457 U.S. at 481-84. *See also* Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739, 745-46 (9th Cir. 1984).

[71] 459 U.S. 519 (1983).

[72] *Id.* at 528.

[73] *Id.*

[74] *Id.* at 535.

[75] *Id.* at 539.

[76] *Id.*

nor competitors in the market in which trade was restrained.[76] Furthermore, the Court believed it significant that the Unions would not necessarily have their interests served by unfettered competition in the relevant market, and indeed may have their interests impeded by uninhibited competition.[77] The Court held that the challenged activities were not the type of injury Congress was interested in protecting against in passing the Sherman Act.[78] Thus, according to the Court, the plaintiff did not satisfy the antitrust injury element in its private action under section 4.

The Court described a number of other "factors" relating to an antitrust plaintiff's standing to sue, including: the defendant's intent to commit an anticompetitive act, causation-in-fact, the directness of the injury as measured by the presence of more immediate victims with a motive to sue, the speculative nature of the claim for damages, and judicial concerns with potential double recoveries and complex apportionment of damages.[79] The Court found that the intent and causation-in-fact elements had been established, but that the plaintiff had failed to allege sufficient facts to establish other factors and therefore lacked standing to sue.[80]

There are a number of issues presented by the Court's decision in *Associated General Contractors* and its relationship to the antitrust standing doctrine. The Court's analysis proposed a balancing standard to determine antitrust standing, but the Court failed to determine whether the antitrust injury requirement was a separate element in a private action. The Court's failure to explain the relationship between the antitrust standing doctrine and the antitrust injury requirement leaves a noticeable void in the understanding of textual and non-textual standing requirements. The Court did not explain the significance of the defendant's intent to engage in anticompetitive behavior as a factor in the plaintiff's standing to sue. Intent is a difficult issue to factor into a threshold standing requirement unless the applicability of the requirement depends on the severity of the violation.[81] The Court also stressed the potential for double recoveries against the same defendant as a consideration in the standing to sue analysis. This factor appears to be nontextual and prudential; it reflects judicial concerns about both Congress' intent in providing a private right of action in section 4 and the ability

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[77] *Id.*

[78] *Id.* at 540.

[79] *Id.* at 537-45.

[80] *Id.*

[81] As discussed later, the Court has shown little interest in changing the nature of the standing to sue analysis according to the plaintiff's allegation of a per se or rule of reason claim. *See infra* note 91 and accompanying text. The issue of the defendant's intent may be important, however, where participants are used by defendants in "a purposefully anticompetitive scheme" aimed at competitors. *Cf.* Blue Shield v. McCready, 457 U.S. at 483.

of the courts to equitably impose multiple damage awards for the same conduct.[82] The Court did not, however, indicate the appropriate manner of applying the balancing standard for determining antitrust standing, nor did the Court give any guidance on the relative importance of each factor.

c. *Unbundling Antitrust Injury and Antitrust Standing*

The Court's decisions in cases involving the standing and antitrust injury doctrines have been the subject of criticism because of the perceived uncertainty associated with the opinions.[83] More particularly, the decisions have been criticized because the balancing standard established in *Associated General Contractors* and *Blue Shield* failed to give guidance to antitrust litigants and the courts and because the antitrust injury requirement established in *Brunswick* was vague.[84] Moreover, the Court's standing and antitrust injury cases were criticized because the Court failed to address several issues central to an understanding of the standing doctrine. Some of those unresolved issues were addressed in a recent case.

In *Cargill, Inc. v. Monfort of Colorado, Inc.*[85], the Court held that a competitor lacked standing to enjoin the merger of the second and third largest beef packers, when it claimed that it was threatened with lost profits from a possible post-merger, cost-price squeeze pricing plan. The Court held that plaintiffs seeking injunctive relief under section 16 of the Clayton Act must show a threat of antitrust injury, just as plaintiffs seeking damages under section 4 must demonstrate antitrust injury.[86]

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[82] The Court's prudential concerns about the unfairness of awarding duplicative damages have been reflected in several cases. In Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972), the Court, interpreting the "business or property" requirement, expressed grave concerns with "the problems of double recovery inherent in allowing damages" to the State for injuries to consumers. Later, in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the Court prevented plaintiffs remote in the chain of distribution from the defendant's unlawful conduct from measuring damages by the amount of overcharge passed through the chain. The Court ruled that the plaintiffs' overcharge damage measurement created an unacceptable risk of duplicative recoveries against the defendants. *Id.* at 730-31.

[83] *See, e.g.*, Page, *Antitrust Liability*, *supra* note 7, at 1449.

[84] *See, e.g.*, Calvani, *supra* note 36, at 324; Note, *Antitrust Standing, Antitrust Injury and the Per Se Standard*, 93 YALE L.J. 1309 (1984).

[85] 479 U.S. 104 (1986).

[86] *Id.* at 111. The Court, relying on the language of section 16 of the Clayton Act (15 U.S.C. § 26) held that the plaintiffs must show proof of "threatened loss or damage by a violation of the antitrust laws." The Court reasoned that despite differences between the language and purpose of sections 4 and 16 of the Clayton Act, it would be anomalous to permit a plaintiff to seek an injunction against a threatened injury for which it would not be entitled to recover damages if the injury actually occurred. *Id.* at 110-11. However, the Court recognized that there were some fundamental differences between private actions for damages under section 4 and actions for injunctive relief under section 16. In particular, the Court noted the important considerations under section 4 that there may be more directly injured victims and whether there is a risk of duplicative recovery or complex apportionment of damages would not be relevant under section 16. *Id.* at 111 n.6.

The Court considered that Monfort's injury from the threatened cost-price squeeze was not antitrust injury because absent below-cost, predatory pricing, that active price competition to increase market share was pro-competitive.[87] The Court held that antitrust injury is not simply a factor to be balanced in the standing equation, but rather "a showing of antitrust injury is necessary . . . to establish standing under section 4."[88] The Court also indicated that antitrust injury, while necessary to maintain a private action, may not be sufficient to confer standing where, for example, other factors identified in antitrust standing cases have not been satisfied.[89]

The Court's *Cargill* decision provides some answers to the standing doctrine enigmas created by prior cases, but creates another complexity, which is addressed in the next section. The description of antitrust injury as a separate element in a private cause of action resolves a question unanswered in *Brunswick*, and it is unclear whether it reflects the textual requirements of section 4. The text of section 4 seems to envision the causal and antitrust injury requirements as a set of interrelated inquires: do the plaintiff's damages result from the defendant's conduct and does that conduct violate substantive antitrust law. Separating the causal requirement from the requirement that the defendant violate the antitrust laws does not seem to advance the standing analysis in any meaningful manner and it may retard the advancement of legislative objectives in section 4 by permitting nonjurisdictional decisions.[90] The *Cargill* decision does not recognize distinctions between statutory requirements and the non-textual considerations forming the antitrust injury rule. Further, the Court again failed to identify the relevance of substantive antitrust law in fashioning either the antitrust injury rule or antitrust standing doctrine.

d. The Issue of Public Injury

The Court's standing cases have not recognized different treatment for per se offenses and rule of reason offenses. For example, the offenses alleged in the *Associated General Contractors* and *Matsushita Electric Industrial* cases arguably fit in categories of per se offenses. The offense alleged in *Blue Shield v. McCready* arguably states a vertical nonprice restraint, which is analyzed under the rule of reason.[91] From a doctrinal

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[87] *Id.* at 114-17. The Court conceded that standing would be conferred by threatened injury in the form of potential market exclusion produced by sustained predatory pricing, but pointed out that the plaintiff had failed to raise a predatory pricing claim in the district court. *Id.* at 117-19.

[88] *Id.* at 110 n.5.

[89] *Id.* at 110 n.5, 111 n.6.

[90] *See supra* note 44 and accompanying text.

[91] *See* Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988).

perspective, then, the same considerations underlie the determination of antitrust injury and standing in a plaintiff's private cause of action in per se and rule of reason cases. This perspective implicitly recognizes that the concept of standing links the plaintiff's injury to the defendant's conduct which must contravene some established statutory or common law rule, irrespective of whether the substantive violation causes presumptive injury or not.[92] In other words, the text of section 4 requires only that the plaintiff identify a plausible connection between his injury and some conduct by the defendant that violates the antitrust laws.

The Court in *Cargill*, however, implied that the plaintiff could establish antitrust injury only by demonstrating below-cost, predatory pricing.[93] This dicta, which can be traced to imprecise language in *Brunswick*,[94] has led some lower courts to conclude that a plaintiff must allege and demonstrate predatory pricing as a condition to maintaining a lawsuit for price fixing.[95] This view of antitrust injury imports another prudential consideration into the standing equation, i.e., that the plaintiff must show a "public injury" to competition. Any requirement that the plaintiff prove predatory pricing is an inappropriate consideration for a standing analysis because it clearly goes to the merits of the plaintiff's case. The notion that a private plaintiff must show public injury has been rejected by the Supreme Court in cases involving the substantive requirements of the Sherman Act.[96] Further, the Court in *Brunswick* rejected a similar argument, concluding that antitrust plaintiffs need not prove an actual lessening of competition to recover under section 4.[97]

B. The Current State of the Antitrust Standing Doctrine

The preceding analysis demonstrates the inadequacy of the Court's standing analysis. It is apparent that the Court's standing doctrine is

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[92] *See* Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d at 1418-19.

[93] 479 U.S. at 117-18 (1986). The Court drew a distinction for purpose of antitrust injury analysis between "price cutting aimed simply at increasing market share" and predatory pricing, which was defined as "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run."

[94] *See supra* notes 53-56 and accompanying text.

[95] *Indiana Grocery*, 864 F.2d at 1420. The Seventh Circuit interpreted *Cargill* as follows:

> Under the Court's analysis, the former is vigorous competition; only the latter is anticompetitive and capable of inflicting antitrust injury .... In our view ... nonpredatory pricing is competitive pricing that cannot inflict antitrust injury upon a competitor.

Id.

[96] *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

[97] 429 U.S. at 489 n.14.

confused because it encourages judicial reactions to antitrust claims on the merits and does not advance a threshold analysis of textual requirements and prudential considerations. The antitrust standing doctrine lacks pertinence and instrumental significance because courts can select from an extensive menu of factors to arrive at a decision about standing to sue, but there is no guidance about the relative importance of those factors, nor, for that matter, do many of the articulated factors bear any demonstrated relevance to antitrust policy. The Court has frequently expressed the importance of analysis concerning the existence of antitrust injury but has not defined the role of the requirement in antitrust standing doctrine.

It is also apparent that the Court's treatment of antitrust standing has lost its moorings in congressional policy. Various imprecise interpretations of the *Brunswick* holding have distorted the antitrust injury requirement beyond legislative intention and have permitted the gradual abandonment of the objectives of section 4. The tortured development of the antitrust injury requirement from its ambiguous inception in *Brunswick* to its manifestation as a substantive rule in *Matsushita Electrical Industrial* shows the need for more judicial precision in defining the rule and greater fidelity to congressional prerogative in section 4.

II. A STATUTORY ANALYSIS OF ANTITRUST STANDING AND ANTITRUST INJURY DOCTRINES

It is possible to define the antitrust injury doctrine in a manner that accommodates traditional antitrust values and the contemporary views about the proper purposes of the antitrust laws. This process of accommodation requires a coherent analysis by the Supreme Court and must be based upon a sound analytic foundation that advances the values explicit and inherent in antitrust policy. The fundamental guides to a coherent analysis of the antitrust injury requirement are (1) congressional policy expressed in section 4; (2) antitrust policy which is reflected in the legislative history of the substantive provisions of the antitrust laws and in judicial interpretations of the antitrust laws; and (3) a cogent process for "intermeshing" the substantive and procedural provisions of the antitrust laws.

A. Statutory Standing

The most useful way of approaching the issue of an appropriate standard for antitrust standing is to recognize that Congress has established by statute the elements or requirements for bringing a private action. Antitrust standing is therefore similar to the standing analysis where Congress has established a statute granting private rights of action for violations of a substantive statute. A close analogy is private actions for judicial review of administrative agency decisions. These cases involve a

procedural statute granting a private right of action to "persons aggrieved" by an agency decision which violates substantive rights.[98] The analogy between standing to seek review of agency decision-making and antitrust standing is close because private actions under section 4 involve the vindication of claims arising under substantive antitrust law but which are governed by the procedural requirements of section 4.

The issue of standing to sue principally involves a judicial determination of congressional intent for a statutory grant of a cause of action and a determination of whether Congress intended to provide the plaintiff access to the federal courts.[99] The standing issue, then, presents sensitive issues of separation of powers and the judiciary's application of its traditional expertise at interpreting statutes.[100] The tension represented by separation of powers concerns is most acute where a court attempts to engraft onto congressional requirements other prudential concerns or judicially compelled considerations that demonstrably affect standing analysis.[101]

Statutory standing is generally approached through two sorts of inquiries: first, whether the plaintiff has sufficient interest in the case to warrant access to the federal courts; and second, whether the plaintiff is a proper party to raise the substantive issue involved in the case.[102] The access inquiry asks whether the party seeking a federal forum for the adjudication of a claim has demonstrated some harm to an interest cognizable by law.[103] The interest involved in the case may be recognized by the courts, the Congress or the Constitution.[104] When access standing is defined by statute the pertinent inquiry is whether the congressional language has sufficiently articulated a public value, the violation of which permits access to the courts.[105]

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[98] *See, e.g.*, Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987); Ass'n of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970).

Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1982), provides for a private right of action to any person "aggrieved by agency action within the meaning of a relevant statute."

[99] Sunstein, *supra* note 11, at 1466.

[100] Nichol, *supra* note 11, at 91; Sunstein, *supra* note 11, at 1459-61.

[101] Nichol, *supra* note 11, at 71-72, 90-92; Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 678 (1977) (some issues must be left to courts).

[102] The analysis of statutory standing is derived from three sources: Sunstein, *supra* note 11; Nichol, *supra* note 11; Scott, *Standing in the Supreme Court – A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

[103] Nichol, *supra* note 11, at 89.

[104] *Id.* at 89-91.

[105] *Id.* at 91. The formulation of a public value which the Congress intended to be advanced is not always an easy task, but the Supreme Court has frequently granted standing to parties seeking to vindicate claims under statutes which the Court has construed to possess values worth protecting. *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208 (1972) (granting standing to "persons aggrieved" to claim a protectable interest in the "social benefits of living in an integrated community"); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1978) (interpreting Civil Rights Act of 1968 to confer on "all 'persons' a legal right to truthful information about available housing.").

The issue inquiry assumes the presence of some legally protectable interest by the plaintiff, but questions whether the plaintiff is the appropriate party to press the issues and claims raised in the case.[106] This inquiry requires an assessment of the relationship between the plaintiff as a proper party to vindicate the asserted claims and the reach of the substantive law implicated by those claims.[107]

The issue inquiry has traditionally been approached via a zone of interest test.[108] This test considers whether a statutory scheme evidences a congressional desire to benefit a particular class of litigants, and focuses judicial attention on the nexus between the plaintiff's asserted injury and the substantive claims presented for review.[109] The Supreme Court has noted that the issue really concerns congressional intent; that is, whether the plaintiff is the type of litigant that Congress intended to protect from substantive violations of law.[110] The zone of interest test, then, involves a standing to sue approach which emphasizes the intermeshing of statutes recognizing private rights of actions and statutes which create substantive rights and duties.

In *Clarke v. Securities Industry Association*, the Supreme Court addressed the zone of interest test in a case involving claims by a beneficiary of agency action, a nonregulated trade association.[111] The Court held that

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[106] Nichol, *supra* note 11, at 95. "Issue standing, however, asks not whether a litigant may invoke federal jurisdiction, but whether he is an appropriate party to present the constitutional claim. Emphasis is no longer on the plaintiff's personal stake in the controversy, but on the litigant's relationship to the legal claims he presents."

[107] Scott, *supra* note 102, at 684.

[108] *See, e.g.*, Clarke v. Securities Indus. Ass'n, 479 U.S. at 394-403. The zone of interest test was first articulated in Ass'n of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970), and more fully developed in Investment Co. Inst. v. Camp, 401 U.S. 617 (1971). Those cases articulate the nature and reach of the zone of interest test. The *Data Processing* Court noted that the standing issue is really one of interpreting congressional intent because "Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise." 397 U.S. at 154. According to the Court, the significant inquiries concerned whether the plaintiffs were the type of parties that the statutory policy attempted to protect and whether the injuries they suffered were of the type that Congress attempted to prevent in passing the substantive law. 397 U.S. at 157; 401 U.S. at 620-21.

[109] Nichol, *supra* note 11, at 96-97.

[110] *See* Clarke v. Securities Indus. Ass'n, 479 U.S. at 396-99; Block v. Community Nutrition Inst., 467 U.S. 340, 347-51. The Court, in cases involving the right to seek judicial review from agency decisions, has recognized a presumption in favor of judicial review, but has held that the presumption may be overcome when congressional intent to preclude judicial review is "fairly discernible in the statutory scheme." Block v. Community Nutrition Inst., 467 U.S. at 351 (quoting *Ass'n of Data Processing Serv. Org.*, 397 U.S. at 157).

[111] The standing issue was implicated because the substantive statute involved, the McFadden Act, 12 U.S.C. § 36, regulated banks. The plaintiff was a trade association representing securities brokers, underwriters, and investment bankers who sued to compel the Comptroller to enforce provisions of the Act which,

a nonregulated litigant can seek judicial review of agency action, unless its interests "are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[112] The Court stressed that the applicable test was not intended to be "especially demanding" and that "there need be no indication of congressional purpose to benefit the would-be plaintiff."[113] The *Clarke* Court then engaged in a traditional analysis of discerning congressional purpose, stressing in that case the policy implications inherent in the "overall context" of the legislative scheme.[114]

The analysis used by the Court to determine whether a litigant possesses standing to seek judicial review of an agency decision which adversely affects him is useful in describing an appropriate standard for antitrust standing. In both situations a procedural statute grants a private right of action to persons who have been harmed by violations of substantive law. In both situations, the substantive law creates the reach of the statute and, together with the procedural law creating the right of action, defines the class of persons who are entitled to protection. The zone of interests standard properly forces judicial decision-making on the important causal issue of whether Congress intended to redress the plaintiff's injury. Traditional standing analysis views the zone of interest standard as a prudential consideration in public law adjudication.[115] In antitrust standing analysis, however, the identical causal relationship is partially compelled by the language of section 4 and partially imposed by prudential considerations shaped by case law. The following section applies a statutory standing model to private antitrust actions.

B. Antitrust Standing – A Statutory Standing Model

The following sections apply a statutory model of standing to private action for damages under section 4 of the Clayton Act. This analysis proceeds on the belief that antitrust standing is fundamentally no different than standing issues under other statutory schemes. The first part examines the textual requirements of section 4 to determine, from the statutory language, the nomenclature of a private action and to discern

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plaintiff contended, limited banks from engaging in discount brokerage activities. 479 U.S. 388. Clearly, the McFadden Act did not address the right of nonbanking entities to challenge substantive provisions of the Act and the Comptroller claimed that the plaintiff lacked standing because it was not within the zone of interests protected by the act.

[112] *Clarke*, 479 U.S. at 399.

[113] *Id.* at 399-400, citing Investment Company Inst. v. Camp, 401 U.S. 617 (1971).

[114] 479 U.S. at 401-403.

[115] Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474-75 (1982); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977) (zone of interest test applied to find standing for claims asserted under the commerce clause).

from that language the congressional intent underlying section 4. The second part reviews purposes and objectives of private antitrust rights of action under section 4 as demonstrated in the overall context of the statutory scheme and the legislative history. The final section examines some prudential considerations which courts may properly recognize to shape the decision on whether litigants should have standing to maintain private actions for damages.

1. Defining the Text of Section 4: The Language and Meaning of the Statute

As a threshold matter, section 4 provides a private right of action by requiring that the plaintiff allege and prove that he was "injured . . . by reason of anything forbidden in the antitrust laws." To recover damages the plaintiff must have suffered some economic injury that flows from, or is causally related to, the defendant's violation of the antitrust laws.

There are two principal components to the textual requirements under section 4. First, the statute requires that the plaintiff possess a sufficient personal stake in the outcome of the case to ensure that he properly vindicates the purposes of the antitrust laws. This requirement that the plaintiff suffer injury to his business or property, i.e., an economic injury, ensures that the plaintiff has suffered injury in fact. At the core of any standing doctrine, then, is the requirement that the plaintiff have a personal stake in the outcome of the case; that is, the plaintiff has suffered an injury caused by defendants conduct which violates some substantive provision of the law.[116]

The second textual component requires that the plaintiff's injury must be related to that aspect of the defendant's conduct which violates the antitrust laws. This nexus or causal component insures that the plaintiff's injury is related to conduct which violates the substantive antitrust law. This aspect of antitrust standing functions like the zone of interest test in statutory standing cases and requires a consideration of whether the plaintiff is a proper party to litigate the claims asserted, and asks whether the plaintiff has asserted a sufficiently close connection between his injuries and the statutory objectives.[117] Moreover, the language of section 4 requires judicial consideration of the causal nexus between injury and anticompetitive behavior.

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[116] The requirement that the plaintiff have a personal stake in the outcome of his antitrust action is directly analogous to standing requirements in public law actions, such as the vindication of constitutional rights or the right to judicial review of agency action. *Cf.* L. TRIBE, *supra* note 13, at 111-12. The principal function served by an injury requirement is to diminish the likelihood that outsiders or intermeddlers will be able to interfere with beneficial arrangements; that is, whether the plaintiff is the type of litigant that Congress wished to benefit from the statutory scheme. Sunstein, *supra* note 11, at 1462.

[117] The causation requirement in standing analysis requires consideration of whether the plaintiff's harms are probabilistic or systemic, on the one hand, or

The litigant should be granted standing where there is some "indicia — however slight — that the litigant before the court was intended to be protected, benefited or regulated by the statute under which the suit is brought."[118] Where the plaintiff has asserted claims that fall within the zone of interests Congress sought to protect by passage of the Sherman Act and Clayton Act, standing should be recognized. Allegations that the plaintiff has suffered an economic injury to his business or property and that the injury flows from conduct proscribed by positive antitrust law should presumptively create access to the federal courts.

The direct causal standard described in the preceding paragraphs greatly simplifies the antitrust standing analysis. It advances the textual requirements of section 4 and accomplishes the same jurisprudential objectives served by its analogous application in public law litigation; i.e., it forces judicial attention toward interpretations of congressional intent and away from nonjurisdictional ends. It provides a useful, and institutionally sound, method of linking individual harms to the congressional interests pursued by section 4.[119] Those interests which Congress sought to advance by the antitrust laws are set out in the following section.

2. Policy Objectives of the Antitrust Laws

A great deal of the commentary on the antitrust standing doctrine is directed at discovering the objectives of the antitrust laws.[120] This invitation to examine the legislative history is required by the language of section 4 of the Clayton Act, which provides a private right of action for injuries suffered by reason of anything forbidden in the antitrust laws.

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individual, on the other. Sunstein, *supra* note 11, at 1463. Examination of the causation requirement in antitrust standing is therefore simplified because individual harm is required in many antitrust causes of action. However, in some actions, such as challenges to mergers, the harm may be probabilistic or systemic and the causation analysis more closely resembles standing to review agency action. *Cf. Brunswick*, 429 U.S. at 487 (noting the difficult problems of intermeshing section 4 with statutory prohibition against acts which potentially cause harm).

[118] Public Citizen v. F.T.C., 869 F.2d 1541, 1547 n.8 (D.C. Cir. 1989) (quoting Autolog Corp. v. Regan, 731 F.2d 25, 29 (D.C. Cir. 1984)).

[119] The zone of interest standard has been attacked as unsuitable in discerning antitrust standing. Page, *Antitrust Liability, supra* note 7, at 1483-84. Professor Page argues that the zone of interest is too imprecise and non-economic to serve adequately any role of culling out improper claims from proper claims. According to his analysis, the only proper measure of any standing analysis is its ability to provide optimum deterrence to the antitrust laws. *Id.* This argument, however, is built entirely upon the fragile premises that the only objective of antitrust policy is the advancement of allocative efficiency and the only objective of private antitrust actions is deterrence. *Id.* at 1450-52, 1483-84; *see also* Page, *Antitrust Damages, supra* note 7, at 1471-73. Neither of these premises is supported by the law.

[120] *See, e.g.*, Page, *Antitrust Damages, supra* note 7, at 1471.

It is also necessitated by the holding in the *Brunswick* case linking together substantive violations of the antitrust laws, a causal connection between the plaintiff's injury and the defendant's conduct, and the need for demonstrated antitrust injury.[121] Finally, as discussed in the preceding section, an examination of legislature purposes and the scheme of the statutory scheme is necessary to determine whether the plaintiff is an appropriate litigant to vindicate claims under the antitrust laws. There are essentially two problems raised by these intersections between legislative purpose and the antitrust standing doctrine: First, there is no consensus on a hierarchy of purposes of the antitrust laws, and, second, there is no agreement on how recognized purposes should influence standing doctrine.

The search for a definite statement of objectives or purposes of the substantive antitrust laws — particularly the Sherman Act — has occupied antitrust scholars for many years.[122] Some commentators have concluded that maximization of economic efficiency is the single purpose of the antitrust laws.[123] They assert that the drafters of the Sherman Act intended that the Act be interpreted to enhance the proper allocation of economic resources. This basic theme has two aspects: first, that the goal of the antitrust laws is to improve consumer welfare and, second, that the proper goal is to make the production and allocation of goods more efficient by expanding output or reducing costs.[124] Other commentators have stressed the importance of other objectives — including populism, protection of small businesses, technological progress — which also reflect the legislative policy of the antitrust laws.[125] Indeed, even the Supreme Court has identified various objectives that it believes motivated Congress

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[121] 429 U.S. 477, 489 (1977).

[122] *See, e.g.*, Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020 (1987); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Flynn & Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125 (1987). For an excellent review of the jurisprudence of the Supreme Court at the time of its early antitrust standing cases, *see* Sullivan, *The Economic Jurisprudence of the Burger Court's Antitrust Policy: The First Thirteen Years*, 58 NOTRE DAME L. REV. 1 (1982).

[123] *See, e.g.*, R. BORK, THE ANTITRUST PARADOX 50-133 (1978); R. POSNER, ANTITRUST LAW 103-13 (1978); Page, *Antitrust Liability*, *supra* note 7, at 1451.

[124] *See, e.g.*, Page, *Antitrust Liability*, *supra* note 7, at 1449-51 (concluding that any antitrust liability rules must be dictated by an economic efficiency standard); I P. AREEDA & D. TURNER, ANTITRUST LAW 7-25 (1978) (concluding that the "economic objective of a pro-competition policy is to maximize consumer economic welfare through efficiency in the use and allocation of scarce resources, and via progressiveness in the development of new productive techniques and new products that put those resources to better use.")

[125] *See, e.g.*, Brodley, *supra* note 122; Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretations Challenged*, 34 HASTINGS L.J. 65 (1982); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

in passing the antitrust laws, including the advancement of consumer welfare, the protection of small businessmen, populism, and the prevention of misuse of economic power.[126]

There is also active debate about the purposes of the private right of action for damages under section 4 of the Clayton Act. Commentators have argued that there is a single objective for the private right of action, as revealed by the legislative history of the antitrust laws, which is to deter further anticompetitive behavior.[127] For example, it has been argued that the antitrust injury rule articulated in *Brunswick* promotes the deterrence function by requiring the dismissal of lawsuits which provide suboptimal penalties or in which private losses do not approximate the net efficiency loss created by the unlawful behavior.[128] This economic approach is premised on belief that economic efficiency is the sole criterion for evaluation of substantive antitrust law and that the objectives of the substantive and procedural antitrust law merge in a manner which subordinates private compensatory interests to public deterrent objectives.[129]

This is a narrow view of antitrust norms because both the legislative history of section 4 and a relatively consistent line of judicial interpretation of legislative objectives have concluded that deterrence is not the single objective to private enforcement of the antitrust laws. There is a strong record of congressional recognition of the need to compensate victims of antitrust violations for their losses.[130] The damages provision, according to one sponsor, was "intended to provide for enforcement of the Act through 'reliance on self policing capacity of business' by granting

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[126] *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (recognizing that section 1 of the Sherman Act was intended to (1) provide independence and opportunity for "small dealers and worthy men," (2) provide freedom of choice for shippers, (3) fair prices and freedom of choice for ultimate customers, and (4) a market governed by competition rather than by private agreement). *See* E. FOX & L. SULLIVAN, CASES AND MATERIALS ON ANTITRUST 44 (1989).

[127] *See, e.g.*, Page, *Antitrust Liability*, *supra* note 7, at 1451-52.

[128] Page, *Antitrust Damages*, *supra* note 7, at 475-76.

[129] *Id.* at 472-73; Page, *Antitrust Liability*, *supra* note 7, at 1450-59.

[130] The history of the remedial provisions of section 4 is set out in ABA Antitrust Section, Monograph No. 13, *Treble-Damages Remedy* 16-21 (1986) [hereinafter *Treble-Damages Remedy*]. The debates on the bills which eventually resulted in the Sherman Act demonstrate substantial congressional interest in providing incentives to private parties to bring actions under the statute and to compensate them for their injuries. *Id.* Senator Sherman argued that the bill was a "remedial statute" giving the federal courts the power to prevent monopolies, and, in discussing the private damage remedy, he stated:

> The measure of damages, whether merely compensatory, putative [sic] or vindictive, is a matter of detail depending upon the judgment of Congress. My own opinion is that the damages should be commensurate with the difficulty of maintaining a private suit against a combination such as is described.

Id. at 17-18, quoting 21 Cong. Rec. 2456.

an injured businessman damages that '[m]ake it worth his while' to sue if he is injured."[131]

Moreover, there are clear statements by the Supreme Court of the importance of the compensatory function of private actions.[132] The Court frequently referred broadly to the objectives of section 4 as the protection of consumers and businessmen against anticompetitive behavior, the promotion of suits by private attorneys general to deter antitrust violations, and the compensation of victims of anticompetitive conduct.[133] In fact, the *Brunswick* Court, after noting that the treble damage feature of section 4 serves "an important role in penalizing wrongdoers and deterring wrongdoing," averred to the section as "designed primarily as a remedy."[134]

Although there is no consensus that definitively ranks the many objectives articulated by Congress in enacting the Sherman Act, the advancement of congressional policies represented by section 4 should not be impeded. Moreover, congressional desire to advance two objectives — deterrence and compensation — by creation of a private right of action should not retard the development of a just and efficient antitrust standing doctrine. Accommodation of substantive and procedural statutory objectives should proceed according to the following general precepts. First, there must be judicial respect for the political implications of statutory norms. If Congress desires to accomplish dual objectives in providing a private right of action, courts must advance those objectives.[135] Second, courts must recognize that there are qualitative differences between the articulation of objectives under section 4 and the more general policies of the Sherman Act. Congress clearly identified its purpose in section 4 as advancing the full range of roles performed by the private attorneys general vindicating private and public interests. Third, advancement of procedural objectives can proceed independent of the classification of the goals of substantive antitrust law. Courts must make decisions concerning the merits of a plaintiff's claim, but this process of

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[131] *Treble-Damages Remedy*, *supra* note 130, at 18 (quoting 2 G. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 363 (1903)).

[132] *See, e.g.*, Blue Shield v. McCready, 457 U.S. 465, 472 (1982) ("the lack of restrictive language reflects Congress' 'expansive remedial purpose' in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.").

[133] *See* Blue Shield v. McCready, 457 U.S. 465, 472-73; Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979); Pfizer Inc. v. Government of India, 434 U.S. 308, 312 (1978); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977).

[134] 429 U.S. at 485-86.

[135] The Supreme Court has frequently recognized the importance of the principle of institutional deference in the context of section 4. In Blue Shield v. McCready, the Court discussed its role in interpreting the congressional language of section 4, and stated that "[c]onsistent with the congressional purpose, we have refused to engraft artificial limitations on the § 4 remedy." 457 U.S. at 472. In Radovich v. National Football League, 352 U.S. 445, 454 (1957), the Court commented that "[i]n the face of [congressional antitrust] policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress . . . ."

determining positive law is fundamentally different than the threshold, jurisdictional issues decided in a standing analysis. Sound antitrust policy requires a standing analysis that properly accommodates compensatory objectives and deterrent functions in private antitrust actions, and this policy should reflect the textual elements set out in section 4 and properly designed prudential considerations.

3. Prudential Considerations and Their Relationship to Antitrust Standing Doctrine

The Supreme Court's cases on antitrust injury and standing demonstrate the use of non-textual considerations.[136] These considerations consist of prudential concerns which affect the manner in which the Court has approached and decided antitrust standing issues. Prudential considerations are important, and necessary, because the broad statutory language, if applied literally, could permit suits by parties remote to the antitrust violation or whose damages are tangentially, or inconsequentially, related to any anticompetitive behavior.[137]

The considerations shaped by the Court's standing decisions have not developed in a manner which permits predictable application by lower courts and antitrust litigants, and there is a great need for clarity and consistency in the design and application of prudential considerations. The Court's ruling in *Blue Shield v. McCready*, for example, holds that someone not a victim of an antitrust scheme can recover damages if she has been used as an instrumentality of the scheme.[138] This prudential gloss on the causation element of antitrust standing was ignored in the *Associated General Contractors* case. The antitrust injury requirement articulated in *Brunswick*, which expressed concern that antitrust plaintiffs measure damages in a manner consistent with antitrust policy, was contorted into a tool to alter substantive antitrust law in the *Matsushita Electric Industrial* case. These examples reflect a fundamental problem with the development of the antitrust standing doctrine: the Court's use of considerations in ways that contradict the substance of textual standing requirements. The Court's rejection of congressional policy to provide jurisdictional recognition to claims for compensation reflects a judicial usurpation of the congressional policy reflected in section 4.

Prudential considerations which serve to condition access to the federal

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[136] In Blue Shield v. McCready, the Court admitted that "in the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, we have applied § 4 in accordance with its plain language and its broad remedial and deterrent objectives." 457 U.S. at 473.

[137] H. HOVENKAMP, *supra* note 21, at 355-66.

[138] *See supra* note 70 and accompanying text.

courts are appropriate only if they satisfy three requirements. First, the consideration must be firmly rooted in the policies which either advance or are consistent with the fundamental objectives of the antitrust laws.[139] Second, prudential consideration must reflect an important concern about judicial competence to adjudicate the asserted claim. Third, application of any prudential consideration must be principled and avoid a decision on the merits of the claim.[140]

The Court's decisions on antitrust standing demonstrate at least three prudential considerations which add clarity to the textual requirements of section 4 and demonstrate an institutional commitment by the courts to advance antitrust policy. Those considerations are: (1) the plaintiff must be a proper party to vindicate claims under the antitrust laws; (2) an antitrust plaintiff cannot measure his damages in an inappropriate manner, and (3) an antitrust plaintiff must show a close and proximate relationship between his injury and conduct forbidden by the antitrust laws.

The initial consideration addresses the status of the party as an antitrust litigant. Section 4 only requires that the "person" suffer injury to his "business or property" because of any conduct forbidden in the antitrust laws. The antitrust plaintiff should be the sort of participant in the marketplace in which the violation occurs that ensures that his litigation will vindicate the policies and objectives of the antitrust laws.[141] A proper antitrust plaintiff usually will be a competitor of the defendant or a consumer in the market.[142] The legislative history of section 4 clearly supports recognition of consumers and competitors as proper antitrust plaintiffs and recognizes their ability to achieve statutory objectives through the maintenance of private actions. Commonly, these parties have suffered concrete injuries from anticompetitive conduct and are good vindicators of the antitrust laws. However, where a plaintiff is not a consumer or competitor, he may have a sufficient interest in the outcome

[139] *See Blue Shield*, 457 U.S. at 472 (recognizing that Court should refuse to "engraft artificial limitations" on section 4).

[140] *See* Nichol, *supra* note 11, at 73.

[141] The Supreme Court has given this definition a broad reach. In Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948), the Court recognized that section 4 "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers .... The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

[142] *See, e.g.*, Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 (9th Cir. 1985) (victim must be a "participant" in same market as the antitrust defendants); Henke Enterprises, Inc., v. Hy-Vee Food Stores, 749 F.2d 488, 489-90 (8th Cir. 1984) (plaintiff not a "competitor, participant, nor consumer" in relevant market).

of the case to ensure the presentation of real issues.[143] This may occur where the plaintiff's claim of injury is sufficiently concrete and there is no realistic probability of duplicative recoveries against the defendant for the same offense.[144]

The first prudential consideration, the appropriate status of the plaintiff as a private attorney general, militates against any requirement that the plaintiff demonstrate public injury from the defendant's conduct. Indeed, the Court has held that it is not necessary to show an anticompetitive impact or effect on a relevant market as a condition of maintaining a lawsuit.[145] Rather, it is sufficient that the plaintiff suffer some economic injury or be a part of a market injured by the anticompetitive conduct of the defendant. Recognizing standing to sue because of the plaintiff's status as a competitor or consumer advances the objectives of section 4 by presuming that those parties are in sectors of the market in which anticompetitive effects are most likely felt.[146]

A second prudential consideration requires that an antitrust plaintiff measure his antitrust damages in an appropriate manner. A central thrust of the Court's opinion in *Brunswick* is that a plaintiff may not measure his damages by the amount of monopoly profits he would have obtained but for the anticompetitive act. The appropriate damage consideration is a reflection of the jurisprudential principle that a party should not be permitted to benefit from the wrongdoing of another.[147] This principle has several manifestations. A plaintiff may not measure his

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[143] *See, e.g.*, Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1496-1500, 1499 n.7 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986); Ostrofe v. H.S. Crocker Co., 740 F.2d 739, 745-46 (9th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985); Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290, 294-46, 296 n.6 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984). *See also supra* note 141.

The Supreme Court's decision in *Blue Shield* holds that any person who is injured because of a competitive injury directed at a competitor has suffered antitrust injury. 457 U.S. at 479, 484. This conclusion appears related to the Blue Shield Court's reading of the antitrust injury requirement as an aspect of a broad causation requirement. A clearer linkage between the antitrust injury requirement and the causation inquiry would ease the search for perfect antitrust plaintiffs and would place more emphasis on the factual nexus between the plaintiff's claimed damages and the defendant's illegal conduct. However, standing to sue for such injury may be required by the causation language of section 4; that the plaintiff be injured "by reason of" some activity which violates the antitrust law.

[144] *Cf.* H. HOVENKAMP, *supra* note 21, at 365.

[145] *See* Blue Shield v. McCready, 459 U.S. at 482 (quoting *Brunswick*, 429 U.S. at 489 n.19).

[146] *See* H. HOVENKAMP, *supra* note 21, at 365 (proposing a standard of presumptive standing to consumer and competitors of the violator).

[147] The principle is recognized in tort law. RESTATEMENT (SECOND) OF TORTS, § 920 (1977), provides:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

damages in a way that reflects profits that would have been earned directly or indirectly from illegal conduct. Further, an antitrust plaintiff may not recover for speculative, illusory or imaginary damages.[148] Third, the plaintiff's damages may be established by a "just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiff's business" and from any evidence of injury which is "not shown to be attributable to other causes."[149]

The second prudential consideration — an appropriate measurement of damages — advances the deterrence function and the compensatory objective of section 4 by providing an incentive to a proper antitrust plaintiff to seek an equitable measure of compensation for injuries suffered and to deter future anticompetitive conduct by trebling that compensation. It also provides a reasonable check on imposition of inequitable measurements of damages, and protects the policies of the antitrust laws by preventing overcompensation for injuries unrelated to anticompetitive behavior.[150]

A third prudential consideration underlying the antitrust injury doctrine examines the nexus between the defendant's conduct which violates the antitrust laws and the harm suffered by the plaintiff. The Court has emphasized that the relationship between plaintiff's harm and the anticompetitive conduct must be causally and proximately related.[151] The Court has also held that the plaintiff must prove more than a causal nexus between the defendant's conduct and his injury; rather, he must show that the harm he suffered was causally related to the reason that the defendant's conduct violates the antitrust laws.[152] This examination requires a judicial evaluation of the attributes of the restrictive practice which are harmful to competition and then compare those attributes to the plaintiff's assertion of injury.

The third consideration — a demonstrated nexus between the plaintiff's injury and those aspects of defendant's conduct which makes it anticompetitive — forges a connection between the policies of section 4 and substantive antitrust law. It directs attention to the substantive nature of the plaintiff's claim and to the types of antitrust violations. Per se violations, by judicial description, involve conduct which in nature and magnitude are inherently anticompetitive and devoid of redeeming value.[153] Because the per se rule presupposes judicial experience with a particular

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[148] *See, e.g.*, Triple M Roofing Corp. v. Tremco, Inc., 753 F.2d 242, 247 (2d Cir. 1985).

[149] *See, e.g.*, Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946).

[150] There is a wide range of proper measurements of damages from antitrust violations. For a review of those methods, *see Treble-Damages Remedy*, *supra* note 130, at 10-12.

[151] *See, e.g.*, Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983).

[152] *See Brunswick*, 429 U.S. 477.

[153] *See infra* notes 155-58 and accompanying text.

restraint, the process of identifying the class or classes of anticompetitive attributes — for example, higher prices, lower output — is simplified. The threshold nature of antitrust standing analysis, however, only requires that the defendant's conduct violates the antitrust laws, whether the type of violation is explicit in a statute or is derived by judicial analysis.

These prudential considerations, when applied in a manner which is consistent with both the textual statutory requirements and sound antitrust policy, demonstrate a principled and value-neutral method of determining the appropriateness of an antitrust plaintiff's claim for damages. This process for defining antitrust standing as composed on textual requirements and prudential considerations advances proper institutional roles because it expresses no view of the merits of the substantive claim and, more importantly, it advances the congressional policy underlying section 4.

III. ANTITRUST STANDING IN MAXIMUM RESALE PRICE MAINTENANCE CASES

One of the most interesting applications of current doctrine on antitrust standing and injury occurs in cases involving claims of maximum resale price maintenance. It is interesting because the standing issues arise in the context of a per se violation of the Sherman Act and because the Court has agreed to decide the standing issue. This section addresses, in the first part, the judicial treatment by two courts of appeal of the antitrust standing doctrine in maximum resale price maintenance cases. These cases sharply focus attention to the policy implications of the rule of presumptive illegality and its collusion with procedural norms established by the antitrust standing and antitrust injury doctrines. In the final section, a statutory standing analysis is applied to the issue of standing in maximum resale price maintenance.

A. Analytic Contrasts in Maximum Resale Price Maintenance Cases

The Seventh and Ninth Circuit Courts of Appeal have addressed the issue of antitrust standing in cases involving maximum resale price maintenance claims.[154] The courts disagreed at a very fundamental level about

[154] *Compare* Indiana Grocery, Inc v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989) *with* USA Petroleum Co. v. Atlantic Richfield Co., 859 F.2d 687 (9th Cir. 1988), *cert. granted*, ___U.S.___, 109 S. Ct. 2446 (1989).

the meaning of antitrust standing and about the role of the per se rule in the standing calculus. Before addressing the conflict between those appellate courts, the following section briefly identifies the substance of the per se rule and its role in defining the illegality of maximum resale price maintenance.

1. The Role of Presumptive Liability in Antitrust Analysis

A judicial finding that a restraint of trade is per se illegal amounts to a conclusion that the business practice is devoid of redeeming commercial, economic or social value and should be condemned outright and irrespective of any putative benefits.[155] Per se, or presumptive, illegality is a reflection of judicial attitudes toward a practice which experience shows is almost always anticompetitive in either its origin or its effect.[156] Per se rules are the product of either common law condemnation of a practice or of the Court's experience with a practice.[157] The per se rule must be contrasted with another method of determining whether a business practice which restrains trade is illegal, the rule of reason. Under the rule of reason, a court considers the relevant markets in which the alleged restraint has an impact, the nature and history of the alleged restraint, and any matters in defense or justification offered by the defendant.[158] The per se rule and the rule of reason are judicially created forms of analysis which both guide businessmen and inform the process of anti-

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[155] Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958).

[156] In NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103 (1984), the Court stated:

> Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same — whether or not the challenged restraint enhances competition.

[157] *See, e.g.*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 354 (1982); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951).

[158] *See generally* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984); Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979).

In National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978), the Court explained that:

> There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality — they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

trust litigation under section 1; they do not, however, reflect different degrees of illegality.[159]

One of the most controversial antitrust policies established and maintained by the Supreme Court is the treatment of vertical price fixing, or resale price maintenance, as a per se violation of the Sherman Act.[160] In a series of cases going back to 1911, the Court, despite frequent and passionate requests for reversal, has held that resale price maintenance is a restraint of trade actionable under section 1 of the Sherman Act and is therefore per se illegal.[161]

The Supreme Court has applied the per se rule to claims of vertical price fixing for several reasons. In an early resale price maintenance case, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[162], the Court held the practice was illegal because it eliminated the scope of commercial freedom exercised by businessmen in establishing unilaterally their resale price and because it operated as a restraint on alienation of goods. The Court also implied that resale price maintenance was illegal because it reflected an illicit agreement between retailers or resellers.[163] Subsequent cases have recognized other reasons for concluding that resale price maintenance is facially illegal, including the possibility that resale price maintenance may facilitate cartelization at the supplier level and may serve to implement a predatory strategy aimed at a competing dealer.[164]

The economic explanations for maximum resale price maintenance are

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[159] *See* H. HOVENKAMP, *supra* note 21, at 124-34. The essential point that the different methodologies arrive at the same basic conclusion — that the defendant's conduct is or is not illegal — was cogently presented by the court in *Indiana Grocery*, 864 F.2d at 1419:

> Thus, an antitrust violation arrived at by a *per se* rule's presumption of illegality is not inherently any more evil than a violation determined by a Rule-of-Reason market analysis. A violation is a violation.

[160] The courts have recognized that resale price maintenance may be manifested in the form of minimum fixed prices, i.e., a floor price is fixed below which a resale cannot be made; or of maximum fixed prices, i.e., a ceiling price is fixed above which a resale cannot be made. *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145, 148 (1968). Some commentators, however, have considered minimum resale price fixing to be resale price maintenance and maximum resale price maintenance to be some other form of price fixing. *See, e.g.*, P. AREEDA & L. KAPLOW, ANTITRUST ANALYSIS 629 (4th ed. 1988). This article treats maximum resale price maintenance as a form of resale price maintenance.

[161] *See* Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, (1988); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); Albrecht v. Herald Co., 390 U.S. 145 (1968); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[162] 220 U.S. 373, 404-45 (1911). The Court invoked the common law proscription on restraints on alienation of property and questioned the interest which a manufacturer or supplier has in goods after sale. The Court, while acknowledging that a manufacturer or supplier might have some interests in its product after sale, held that a manufacturer or supplier has no legitimate interest in controlling resale prices. *Id.* at 407-409.

[163] *Id.* at 407-408.

[164] *See, e.g.*, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); Simpson v. Union Oil Co., 377 U.S. 13 (1964).

different than the justifications for minimum resale price maintenance. The principal difference arises from the ability of maximum price fixing to simultaneously advance the interests of consumers by capping resale prices while harming retailers or distributors by limiting their resale margins. Notwithstanding this mixture of pro-competitive and anticompetitive effects associated with maximum resale price maintenance, the Supreme Court, in *Albrecht v. Herald Co.*, held that maximum resale price maintenance is per se illegal.[165] According to the Court, many of the same reasons which require per se condemnation of minimum resale price maintenance plans also compel condemnation of maximum price setting plans.[166] The Court explained that the maximum price may be too low to permit dealers to provide necessary and desired services, may rearrange market structures to favor "a few large or specifically advantaged dealers", and may tend to approximate and function like a minimum price set by the manufacturer.[167] The *Albrecht* Court also rejected the argument that a supplier, who had granted its distributors exclusive territorial rights, must be able to cap resale prices to prevent price gouging of customers. The Court held that neither price gouging nor market power possessed by distributors were issues presented in the case.[168] Finally, the Court concluded that the argument that price fixing is necessary to prevent another violation is "unpersuasive."[169]

There are more current explanations of the effects on competition of minimum and maximum resale price maintenance.[170] The current literature suggests that resale price maintenance has both pro-competitive

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[165] 390 U.S. 145, 154 (1968).

[166] The Court held:

> Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold.

Id. at 152.

[167] *Id.* at 153.

[168] *Id.* The Court's decision in *Albrecht* generated a strong dissent from Justice Harlan. He argued that maximum and minimum resale price maintenance agreements should be characterized individually. According to Harlan, maximum resale price maintenance permits a manufacturer to lower its retail price and expand volume or output. *Id.* at 157-58. He also claimed that maximum price ceilings, unlike minimum price levels, are not invariably harmful because ceilings "do not lessen horizontal competition; they drive prices toward the level that would be set by intense competition, and they cannot go below this level unless the manufacturer who dictates them and the customer who accepts them have both miscalculated." *Id.* at 159.

[169] *Id.* at 154.

[170] *See* P. AREEDA & L. KAPLOW, *supra* note 160, par. 403, 629-41; Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence* 13-28 (Fed. Trade Comm'n Staff Report 1983); Lafferty, Lande & Kirkwood, *Impact Evaluations of Federal Trade Commission Vertical Restraints Cases* 5, 29-38 (Fed. Trade Comm'n Staff Report 1984).

and anticompetitive manifestations and it is not possible to definitively assess the competitive impact of the practice.[171] In this respect, the substantive analysis represented by the per se rule has procedural implications. The rule advances concerns about judicial efficiency by eliminating the need for an extensive analysis into the reasonableness of the practice. The presumptive prohibition of the practice also provides a bright line rule for the business community. However, per se illegality may prevent arguably pro-competitive business activity by forbidding an inquiry into the reasonableness of the practice, and it precludes any meaningful discussion of the real effects of resale price maintenance.

Aside from the judicial analysis condemning resale price maintenance, the Congress has indicated its disapproval of the political and economic effects of resale price maintenance. In repealing the Miller-Tying Act, the Congress rejected the concept of fair-trade legislation and left it to the courts to determine an appropriate antitrust response to the practice.[172] The Supreme Court has repeatedly refused to apply the rule of reason to vertical price fixing cases, but rather has maintained its position established in *Albrecht* that the practice is per se illegal.[173]

2. The Seventh Circuit's View

The antitrust bar received a jolt in 1984 when the Seventh Circuit Court of Appeals issued its decision in *Jack Walters & Sons Corp. v. Morton Building, Inc.*[174] The case involved a claim that Morton, a manufacturer of prefabricated farm buildings, prevented its dealers from selling Morton's buildings at prices above the price which Morton advertised for the buildings.[175] The Seventh Circuit, in an opinion written by Judge Richard Posner, affirmed an order of the district court dismissing a dealer's claim that Morton's activities constituted resale price maintenance. Posner noted that Morton imposed an exclusive territorial policy on its dealers and stated that a maximum resale pricing plan is more important for

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[171] Overstreet, *supra* note 170, at 164.

[172] Resale price maintenance was statutorily permitted under federal law by the Miller-Tydings Act. 50 Stat. 693, 15 U.S.C.A. § 1 (1937). The Miller-Tydings Act was repealed in 1975 by the Consumer Goods Pricing Act of 1975, Public Law 94-145, 89 Stat. 801 (1975).

[173] In fact, in Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982), the Court emphasized that maximum price fixing was per se illegal irrespective if it is imposed vertically or as a result of an agreement among competitors. The Court stressed that maximum price fixing is merely another form of price fixing, and that the *Albrecht* and *Keifer-Stewart* cases "place horizontal agreements to fix maximum prices on the same legal — even if not economic — footing as agreements to fix minimum or uniform prices." 457 U.S. at 348.

[174] 737 F.2d 698 (7th Cir. 1984).

[175] *Id.* at 706.

suppliers using exclusive territories.[176] According to Posner, the issue of the presumptive illegality of maximum resale price maintenance imposed by a manufacturer on its dealers was an open question after the *GTE Sylvania* case. But Judge Posner recognized a "more fundamental ground" for affirming the dismissal of the plaintiff's resale price fixing case. He stated that the plaintiff had failed to allege antitrust injury.[177] Posner argued that the antitrust injury rule articulated in *Brunswick* was merely another application of a longstanding rule in tort law that a party injured in a manner not contemplated by statutory protections cannot claim the benefits of the statute.[178] Posner concluded that even if Morton had fixed prices, the only harm suffered by Walters arose from competing dealers lowering their prices to consumers if Walters did not. According to the court, Walters cannot "complain about having to meet lawful price competition, which antitrust law seeks to encourage, merely because the competition may have been enabled by an antitrust violation."[179]

More recently, the Seventh Circuit, in *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*[180], reaffirmed its holding in *Jack Walters & Sons*. The court, in a case brought by a competitor to recover lost profits resulting from a maximum price fixing arrangement, held that an antitrust plaintiff cannot prove antitrust injury by alleging a vertical agreement to fix maximum, nonpredatory prices.[181] The court rejected the plaintiff's argument that it alleged antitrust injury because the alleged violation was

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[176] *Id.* at 706-707. Judge Posner reasoned that the Supreme Court's decision in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) reopened the issue of the per se illegality of maximum resale price fixing which is used to facilitate a reasonable exclusive territorial provision. He further speculated that the use of maximum price limits within exclusive territories is justified because "it forces price within the territories closer to the competitive level." 737 F.2d at 706-707.

[177] The court suggested that the precise activity complained of by the plaintiff was nothing more than a permissive and necessary adjunct to Morton's advertising policy. The court spoke of the embarrassment to Morton if it advertised a price and its dealers failed to adhere to the price. *Id.* at 708. Posner also opined that "Morton had to pressure its dealers to lower price in order to maintain the credibility of its price advertising — a form, by the way, of constitutionally protected speech." *Id.*

[178] The Seventh Circuit cited to Gorris v. Scott, 9 L.R. Ex.-125 (1874), for an apparently controlling "venerable principle of tort causation." 737 F.2d at 708-709. According to the court, the *Gorris* case involved the destruction of animals washed overboard of the defendant's ship. A statute required that animals on deck be penned for reasons relating to the prevention of contagion. Judge Posner concluded that the defendant was not liable because the purpose of the statute was to prevent contagion, not drowning.

[179] *Id.* at 709. The court pointed out that maximum resale price maintenance is only harmful if the maximum prices are set predatorily low. Therefore, any price above the predatory level, but below the maximum price, is a gain to the consumer, and competitors like Walters cannot complain.

[180] 864 F.2d 1409 (7th Cir. 1989).

[181] *Id.* at 1418. The court stated that the plaintiff's claim that it suffered antitrust injury was exactly the same claim advanced and rejected in *Jack Walters & Sons*. The court also held that the reasoning of the Supreme Court in the *Brunswick*, *Matsushita Elec. Indus.*, and *Cargill* cases limited the court's ability to find that the plaintiff had sufficiently alleged antitrust injury. 864 F.2d at 1418.

per se illegal and its injury, was, therefore necessarily of the type the antitrust laws were intended to prevent.[182] The court interpreted *Brunswick* to support the conclusion that "if a plaintiff complains of damages that result from a practice that is itself competitive, it is not alleging an antitrust injury, regardless of whether the practice was enabled by an antitrust violation, *per se* or not."[183] The plaintiff argued that the court's failure to recognize antitrust injury in maximum resale price maintenance cases was contradictory to the Supreme Court's decision in *Albrecht v. Herald Co.* The Seventh Circuit merely stated that the *Albrecht* case was decided nine years before *Brunswick* and, therefore, the court was not prevented from applying the antitrust injury doctrine as it saw fit.[184]

The Seventh Circuit's view of antitrust standing and antitrust injury illustrates the confusion created by the current antitrust standing doctrine and the need for clarity, along with a return to statutory objectives, in a revised standard. There are three principle deficiencies in the Seventh Circuit approach: First, the court assumes that the antitrust standing analysis must be driven by the substantive goal of enhancing allocative efficiency; second, its analysis is designed to serve nonjurisdictional ends; and third, the analysis may result in antitrust violations for which no one has a private right of action.

The Seventh Circuit cases argue that an antitrust plaintiff claiming compensable injury because of a price fixing scheme must be injured by an anticompetitive act and must be injured in a way which produces a

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[182] *Id.*

[183] *Id.* The court, relying on *Jack Walters & Sons* and *Matsushita Elec. Indus.*, held that the antitrust injury requirement is the same irrespective of whether the plaintiff alleges a per se violation or a violation of the rule of reason. The court rejected the Ninth Circuit's analysis in *USA Petroleum* for the reason that the appropriate focus in determining the existence of antitrust injury is section 4 of the Clayton Act, not the substantive provisions of section 1 of the Sherman Act. 864 F.2d at 1419 n.6.

The *Indiana Grocery* court denigrates the analysis articulated by the Ninth Circuit in *USA Petroleum* but fails to describe an appropriate analysis for determining antitrust injury in maximum resale price maintenance cases. *Id.* In relying on the reasoning of *Jack Walters & Sons*, the court in *Indiana Grocery* appears to argue that a competitor cannot allege antitrust injury in cases involving nonpredatory maximum price fixing because the practice "is itself competitive." *Id.* at 1418. This conclusion seems to stand the per se rule "on its head." *Id.* at 1419 n.6.

[184] *Id.* at 1420. The court also rejected the plaintiff's argument that proof of low, temporarily below-cost pricing by the defendant constituted predatory pricing. The court apparently rejected the argument on its merits, finding that the pricing involved in the case was merely "vigorous competition." *Id.* However, the court also held that only predatory pricing is "anticompetitive and capable of inflicting antitrust injury" and further, that "nonpredatory pricing is competitive pricing that cannot inflict antitrust injury upon a competitor." *Id.*

greater economic loss than would nonenforcement of the antitrust laws.[185] For example, in *Jack Walters & Sons*, the court believed that the private loss suffered by the terminated distributor was smaller than the social gain associated with expanded output and product advertising. This approach to antitrust injury inquires in each case whether or not the plaintiff suffered the kind of injury which harms allocative efficiency — that is, whether it reduces output or raises prices — and it assumes that the promotion of economic efficiency is the only proper objective for the antitrust laws. Even if the court's premise was correct, which itself is the subject of great debate[186], the Seventh Circuit cases fail to address the importance of section 4's statutory objectives.

The court's analysis makes an *ex ante* nonjurisdiction decision in maximum resale price maintenance cases and therefore disregards both the proper role of statutory standing and the substantive significance of the per se rule. For example, the *Indiana Grocery* court held that injury stemming from maximum resale price maintenance, a per se violation, is not actionable where the violation resulted from a practice itself competitive.[187] The Court's ruling in *Jack Walters & Sons*, that a terminated distributor has not suffered antitrust injury by a maximum resale price maintenance arrangement, means that resale price maintenance is not illegal insofar as it harms a competitor; a conclusion which is flatly contradicted by the *Albrecht* decision.[188] The per se rule, which is a statement of positive antitrust law, obviates the need for a particularized analysis of the relationship between the defendant's conduct and the objectives of the antitrust law. The rule presupposes the anticompetitive consequences of the conduct and spares judicial inquiry into precise economic effects. The Seventh Circuit decisions strongly suggest lower court dissatisfaction with the *Albrecht* decision.[189] However, it is incorrect to use the antitrust standing doctrine to disregard substantive antitrust law.

The Seventh Circuit's failure to accord proper jurisprudential significance to the per se rule and its nonjurisdictional standing approach have another consequence: the congressional objectives of section 4 may, in some situations, be thwarted. For example, the court's antitrust injury concept may prevent some classic antitrust plaintiffs, such as competitors or consumers, from maintaining any action for anticompetitive conduct, while in other cases it may be possible that no party could maintain an action for anticompetitive behavior. In this important respect, the Sev-

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[185] *See id.* at 1419-20.

[186] *See supra* note 126 and accompanying text.

[187] *Indiana Grocery*, 864 F.2d at 1419-20.

[188] The Seventh Circuit came to a similar conclusion in a case involving minimum resale price maintenance. Local Beauty Supply, Inc. v. Lamaur, Inc., 787 F.2d 1197 (7th Cir. 1986).

[189] *See* Hovenkamp, *Chicago and Its Alternatives*, 1986 DUKE L.J. 1014, 1025-26.

enth Circuit's approach clearly does not further the objectives of section 4 — deterrence and compensation — because it prevents suits by traditional "private attorneys general" who have suffered economic injury. Moreover, the analysis would inject complexity and uncertainty into what should be a threshold determination of plaintiff's standing to sue.

In the context of maximum resale price maintenance cases, for example, the Seventh Circuit's standing requirement would be complex and unfair. If the manufacturer engaged in predatory pricing by establishing a maximum resale price which was too low to permit disfavored rivals to exist at the distribution level, then the disfavored distributors who suffered losses or were driven out of business could maintain an action.[190] Consumers, however, could not maintain an action for this conduct, even though the anticompetitive conduct may have affected their ability to receive desirable products or services.[191] Consumers would not, under this view, suffer antitrust injury in price fixing cases because they were benefitted by the antitrust violation, even when the nascent combination subsequently fostered other anticompetitive conduct or the maximum price became a fixed minimum price.[192]

If, on the other hand, the maximum price was set not at a predatory level but rather at a supracompetitive level, then a consumer could maintain an action but a competitor could not. The competitor, it could be argued, was benefitted by the price fixing scheme because it was able to gouge consumers just like the cartel members.[193] Finally, if the maximum price was instituted by the manufacturer to protect consumers from price gouging, say by a distributor in an exclusive territory, then no one — consumer or competitor — could maintain an action because the defendants' actions, although a per se violation of the Sherman Act, injured no one.[194]

3. The Ninth Circuit's Approach

The Ninth Circuit Court of Appeals, in *USA Petroleum Co. v. Atlantic Richfield Co.*[195], rejected the analysis and conclusion of the Seventh Cir-

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[190] *See Indiana Grocery*, 864 F.2d at 1419-20 (competitor cannot claim antitrust injury for lost profits from defendants' agreement to price at nonpredatory levels).

[191] *Cf.* Albrecht v. Herald Co., 390 U.S. at 152-53 ("Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay.").

[192] *See id.* at 153.

[193] This is apparently the logic of the Supreme Court's dicta in Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), and the Seventh Circuit in *Indiana Grocery*, 864 F.2d at 1420.

[194] *See* Hovenkamp, *supra* note 189.

[195] 859 F.2d 687, 697 (9th Cir. 1988).

cuit in *Jack Walters & Sons*. The *USA Petroleum* case involved a claim by independent gasoline retailers who purchased from a defendant, Atlantic Richfield Co. (ARCO), that ARCO had engaged in maximum resale price fixing and that the intention behind the price fixing plan was to force the independent retailers out of the market.[196] The defendant, in a summary judgment proceeding, claimed that the alleged injury did not result in any antitrust injury to plaintiffs and the district court agreed, dismissing the plaintiffs' lawsuit. The Ninth Circuit reversed, holding that plaintiffs had alleged a per se violation of the Sherman Act and that the plaintiffs had therefore alleged antitrust injury.[197]

The *USA Petroleum* court recognized that maximum resale price maintenance, like minimum resale price maintenance, is per se illegal.[198] ARCO argued that maximum resale price maintenance increases rather than decreases competition because it brings prices lower, not higher.[199] The court, rejecting ARCO's argument, stated that illegal pricing practices have the potential for destroying competitors and competition and that the long term consequences of price fixing conspiracies may be higher prices and reduced service to consumers.[200] The court also rejected the defendant's argument that maximum resale price maintenance is not actionable unless predatory pricing is shown.[201]

The court held that allegations of price fixing are sufficient to allege antitrust injury, and reasoned that it must determine whether plaintiffs injuries resulted from a disruption of competition in the market and were

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[196] *Id.* at 696. The plaintiffs claimed that ARCO's pricing practices also had demonstrated effects of forcing certain retailers out of business and heightening barriers to entry into the retail gasoline market.

[197] The court held:

> We conclude that the purposes and policies of the antitrust laws are best effectuated by recognizing the 'standing' of competitors to enforce the antitrust laws against price-fixing conspiracies. To put the same point differently, we conclude that the injury done to the market and to competitors by price-fixing conspiracies is antitrust injury — the type of injury the antitrust laws were meant to prevent.

Id. at 697.

[198] *Id.* at 692-93. The court examined the legislative history of the Sherman Act, concluding that the drafters clearly intended to condemn price fixing. The court also concluded that the objectives of the antitrust laws do not favor vertical price fixing. *Id.*

[199] *Id.* at 695. ARCO asserted that the Supreme Court's decision in Brown Shoe v. United States, 370 U.S. 294, 320 (1962) required that the court find that the antitrust laws were not offended by conduct which stimulated competition. In *Brown Shoe*, the Supreme Court held that the antitrust laws were enacted for the protection of competition, not for the protection of individual competitors.

[200] 859 F.2d at 696.

[201] *Id.* at 693-94. The court reasoned that predatory pricing is not a necessary condition to maintenance of a vertical price fixing case because the Supreme Court has frequently condemned price fixing without any indicia of predatory behavior.

caused by the defendant's antitrust violation.[202] The court found a direct connection between USA Petroleum's injuries and the alleged conspiracy to fix maximum prices because USA Petroleum contended that the intended objective of the price fixing scheme was to disrupt the market for retail gasoline sales.[203]

In rejecting ARCO's argument that public injury must be demonstrated, the court held that harm to competitors is precisely the kind of injury that the antitrust laws were intended to prevent.[204] The Ninth Circuit also held that since maximum resale price maintenance is another form of price fixing, the standing inquiry examines the type of injuries which are prevented by the rule against price fixing was intended to prevent.[205] Those injuries, according to the court, were generally the same consequences of other price fixing practices.[206] The court distinguished *Cargill, Inc. v. Monfort of Colorado, Inc.* as a case involving the plaintiff's failure to show that the pricing practices were illegal under the substantive prohibitive antitrust statute.[207]

In *USA Petroleum*, the court applied an antitrust standing approach which is fundamentally sound because it stresses the threshold and jurisdictional nature of the standing inquiry. It also appears correct because it tends to advance the congressional objectives of section 4. The court's decision, however, has analytic limitations.

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[202] *Id.* at 693.

[203] *Id.*

[204] *Id.* at 697.

[205] *Id.* at 694.

[206] In analogizing the injuries stemming from price fixing generally to the more specific practice of maximum resale price maintenance, the court stated:

> The Supreme Court has indicated that the per se rule against price-fixing is aimed at the long-term as well as the short-term effects such practices have in the market, and not merely the immediate consequences for prices. *See* Business Elecs. Corp. v. Sharp Elecs. Corp., 108 S. Ct. 1515, 1519-20 (1988) (characterizing interbrand competition as the primary concern of antitrust law, and listing "the creation and maintenance of small businesses" as one of its objectives). The removal of some elements of price competition distorts the markets, and harms all the participants: those retailers which have lost their ability to set prices, the other retailers in the same market who are harmed by the distorted market, and the consumers. Even if we were to analyze the question at the more specific level of maximum resale price fixing, given the long-term consequences of that practice we would reach the same result for similar reasons.

Id. at 694.

[207] *Id.* The court stated that *Cargill* involved pricing practices which the Supreme Court found were vigorously competitive and pointed out that the antitrust laws protect small businesses only against practices which are forbidden by the antitrust laws. In this case, according to the court, USA Petroleum's "injuries result directly from pricing practices that defendants admit (for the purpose of this appeal) are forbidden by the antitrust laws and are therefore illegal." *Id.*

First, the Ninth Circuit's approach presumes injury from the fact that the plaintiffs were competitors with the defendants and that the defendants allegedly participated in a per se offense. The court's standard presumes a market injury from the fact that the alleged violation was price fixing, where closer analysis must be given to the issue of how the plaintiff suffered injury from defendants' anticompetitive actions.

The court's standing decision also overlooks the language of the Supreme Court in *Matsushita Electric Industrial Co.*, that competitors cannot complain about injuries suffered by concerted actions of competitors where the effect of the conspiracy is to benefit the complaining competitors through enhancing the market price.[208] Merely presuming injury from the allegation of a per se violation does not permit careful judicial attention to the issues of the relationship between the plaintiff's injury and the method of compensating him for the defendants' conduct.

Finally, the presumptive illegality analysis of the court in *USA Petroleum* is premised on an equivalence between the effects of horizontal and vertical price fixing arrangements. Indeed, the court argued that resale price maintenance was merely another form of price fixing. However, the conclusion that resale price maintenance may be just another kind of price fixing fails to address the critical issue of whether the plaintiff sufficiently and precisely alleged injury of the type which follows from violations of the antitrust laws. Furthermore, the Supreme Court, in *Business Electronics Corp. v. Sharp Electronics Corp.*,[209] held that the "notion of equivalence between the scope of horizontal per se illegality and that of vertical per se illegality" has been rejected in prior Supreme Court caselaw.[210]

It appears that neither the Seventh Circuit nor the Ninth Circuit approach to antitrust standing in maximum resale price maintenance cases properly resolves all threshold standing issues, although the Ninth Circuit's approach is analytically superior to the Seventh Circuit's. In the next section, the model of statutory standing is applied to the threshold issues to determine if competitors (and others) should be granted standing to vindicate those claims under section 1.

B. A Statutory Approach to Maximum Resale Price Maintenance Cases

A statutory analysis of the antitrust standing doctrine permits resolution of the judicial conflict in maximum resale price maintenance cases.

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[208] *See supra* notes 63-64 and accompanying text.
[209] Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988).
[210] *Id.*

A maximum resale price maintenance claim asserted by a consumer or competitor would satisfy the textual requirements of section 4 so long as the plaintiff can demonstrate that he suffered economic damages as a result of the vertical price fixing scheme. In other words, the antitrust plaintiff must demonstrate that he suffered an economic injury to his business or property by a maximum price fixing scheme and that the damages were the type occasioned by resale price maintenance. Prudential considerations must also be analyzed to determine if antitrust plaintiffs are proper parties to vindicate claims under the Sherman Act, have measured their damages in an appropriate manner, and have alleged a sufficient connection between their injury and maximum price fixing.

Maximum resale price maintenance, as pointed out in *Albrecht v. The Herald Co.*, is a practice which may injure customers of the manufacturer or supplier (say, for example, retailers purchasing from a manufacturer) and ultimate consumers (e.g., customers of the retailers). The practice may also harm competitors of retailers that adhere to the price fixing arrangement. Presumptively, therefore, these parties are proper vindicators of a claim that the defendant's activities constituted vertical price fixing.

It is apparent, however, that the various parties are likely to be harmed in different ways by a maximum resale price fixing arrangement; that is, they may measure their damages in different ways to reflect the types of injuries they have suffered.[211] A retailer may suffer damages because the maximum price is too low to permit him to provide the kinds of presale services and activities which his customers desire. His lost trade may be measured by either a diminution in going concern value of his business or by lost profits which are measured by the difference between the fixed price and the price which would prevail in a competitive market.[212]

A competitor of parties to the price fixing arrangement may be injured where he is terminated because of his refusal to comply with the price fixing arrangement or where he is interfered with because of his refusal to abide by the cartel price. However, the proper measure of his damages is not the amount of supracompetitive profits he lost because of the termination. The terminated distributor may be entitled to the diminution in value of his business because of the termination, or he may be able to prove that he lost profits measured by the difference between the price ceiling and the prevailing price in a competitive market. In cases involving claims by distributors that the price ceiling acted like a price floor, the plaintiff may recover lost profits measured by the difference between the price ceiling and the higher level of prices that would have occurred except for the price fixing arrangement.

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[211] There are many fundamentally correct methods of measuring damages in antitrust cases. *See Treble-Damages Remedy, supra* note 130, at 10-12.

[212] *See, e.g.*, Northwest Publications, Inc. v. Crumb, 752 F.2d 473, 476-77 (9th Cir. 1985); *see also* Warren-Boulton, *Resale Price Maintenance Reexamined: Monsanto v. Spray-Rite*, in THE ANTITRUST REVOLUTION 380-82 (J. Kwoka & L. White eds. 1989).

The statutory standing analysis also requires consideration of whether there is a direct relationship between the plaintiff's harm and that aspect of the defendant's conduct which makes it illegal. The courts have concluded that the probable effects of maximum resale price maintenance include lower prices, supracompetitive prices, lower output by the distributor, and greater costs incurred by attempting to sell goods without a sufficient margin.[213] It is these effects which the Court's ban on price fixing was intended to reach and against which consumers and competitors are entitled to protection. To the extent that the plaintiff's measure of damages comports with a market effect of maximum resale price maintenance, the plaintiff should have standing to maintain his action unless his claimed damages are not "marginally related to or inconsistent with" those interests which the Sherman Act seeks to protect.[214]

This analysis of antitrust standing recognizes the instrumental significance of the statutory language and purpose of section 4. It also accommodates the concerns that courts should have in applying a private right of action for damages under the statutory scheme. Most importantly, it recognizes that antitrust standing is a jurisdictional inquiry into legislative intent, not a means for disposing of substantive antitrust claims which may temporarily be unpopular.

IV. CONCLUSION

The antitrust standing doctrine, since its articulation by the Supreme Court in *Brunswick*, has evolved through a process of judicial interpretation that has left the doctrine without much resemblance to its original content and jurisprudential significance. Courts have routinely, and reflexively, restated the fundamental principles that make up the doctrine, but they have applied the doctrine as if it constituted an independent substantive antitrust provision and not a statutorily required jurisdictional guide.

The doctrine, at its core, reflects a fundamental congressional policy to compensate victims of antitrust violations and to deter future anticompetitive behavior. The core values of the antitrust standing doctrine are enhanced by prudential considerations which represent judicial approaches to advancing the substantive and procedural policies of the antitrust laws. The lower federal courts, in cases involving private causes of action for maximum resale price maintenance, have lost sight of the fundamental significance of the antitrust standing doctrine. It is necessary that the Supreme Court formulate a doctrine which accommodates substantive antitrust policy and advances the jurisdictional policies of section 4 of the Clayton Act. That doctrine should resemble a traditional statutory standing analysis that is rooted in congressional policy favoring private rights of action for antitrust violations.

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[213] *See supra* notes 166-68 and accompanying text.
[214] *See* Clarke v. Securities Indus. Ass'n, 479 U.S. 399.